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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 443

HUGHES TOOL COMPANY
and
RAYMOND M. HOLLIDAY,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This reply brief is made necessary by the implicit distortions of the issues and the explicit misrepresentations of the record contained in the brief of Trans World Airlines, Inc. ("TWA"), and by the misunderstanding of the issues revealed in the memorandum of the Civil Aeronautics Board ("Board" or "CAB").

I.

In determining the jurisdiction of the courts over the complaint of TWA, the dominant facts alleged and not the conclusory allegations of wrongdoing are controlling.

In determining whether a complaint alleges conduct within the jurisdiction of the CAB and in determining whether such conduct has been exempted from the operation of the antitrust laws, the use of labels is not controlling. Rather, what is controlling are the "dominant facts" alleged in the complaint as to the conduct of the defendants. Otherwise the artful pleader could oust an agency of jurisdiction and confer it on the courts by, as here, paraphrasing the statute. Otherwise the exemption would be defeated by the very allegation of antitrust violations.

The basic fallacy in the briefs of TWA and of the Board is the assumption that jurisdiction is determined by the conclusory allegations of TWA's complaint rather than the conduct on which it is based. TWA's brief states:

> "... the Board was never informed of the combination and conspiracy by the defendants to monopolize the supplying of aircraft to TWA, nor was it informed of Toolco's foreclosure of competitive suppliers of aircraft from the TWA market, nor of the arrangement whereby Toolco denied financing to TWA except on condition that TWA acquire its aircraft from Toolco, nor of Toolco's exploitation of a monopoly over the TWA market to further its interests as a supplier of aircraft to other carriers ...." (TWA Br. p. 113)

The Board likewise refers to "the misconduct alleged in the complaint" as if it were something separate and disembodied from Tooleo's supplying of aircraft and financing to TWA pursuant to Board approval:

> ". . . the misconduct alleged in the complaint was no more necessary to the consummation of those transactions than it was to the original acquisition of control." (Memo. p. 16)

But in fact the "misconduct alleged in the complaint" relates to the very dealings between Tooleo and TWA —the supplying of equipment and financing by Tooleo to TWA—which the Board had the power to regulate, which in fact it undertook to regulate, and the course of which it approved in eighteen orders. See Point II, *infra*.

The CAB assumes that it could not possibly have approved or authorized the conduct of which TWA complains, because the complaint alleges that it constituted "an attempt to monopolize", a "tie-in" and a "boycott". What the CAB fails to recognize is that it has jurisdiction over conduct, not conclusions of law, that it authorizes or approves conduct, not the name given by a pleader or even the courts to that conduct, and that what an order under Section 408 of the Federal Aviation Act ("Act") exempts from the antitrust laws is conduct and not epithets.

This Court and the lower federal courts have repeatedly recognized that allegations as to factual conduct, and not the characterization of that conduct as an antitrust violation, control in determining whether a complaint is within the jurisdiction of an administrative agency rather than the courts.

This Court has stated the test of jurisdiction to be whether *"the dominant facts"* alleged as to the defendants' conduct are subject to regulation by the administrative agency. *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 483 (1932).*

In *Luckenbach S.S. Co.* v. *United States*, 179 F. Supp. 605, 611 (D. Del. 1959), *aff'd as to this issue*, 364 U.S. 280 (1960), the three-judge district court defined the issue as whether *"the precise facts* forming the basis of plaintiff's antitrust action are cognizable by the Commission."

Even where the conduct alleged may, on the face of the complaint, appear to violate the antitrust laws, the courts have no jurisdiction if such conduct has been committed by Congress to an administrative agency for regulation. In *Cunard* this Court, referring to an antitrust complaint which on its face charged a violation of the antitrust laws by reason of an alleged conspiratorial "agreement", said:

> ". . . whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. . . . it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications." (284 U.S. at 487)

* Unless otherwise indicated, all emphasis in this Brief has been supplied.

In *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 102 F.Supp. 685, 688 (S.D. Cal. 1952), *aff'd*, 209 F.2d 380 (9th Cir. 1953), the court summarized the rulings of this Court on this question as follows:

> ". . . The Supreme Court has uniformly refused to permit a party under guise of suing under the antitrust laws to seek in the courts, by indirection, determinations which are reserved for the Commission in the first instance. Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183; Central Transfer Co. v. Terminal Railroad Ass'n, 288 U.S. 469, 53 S. Ct. 444, 77 L. Ed. 899; Terminal Warehouse Co. v. Pacific R. Co., 297 U.S. 500, 56 S. Ct. 546, 80 L. Ed. 827. As these cases show, *the plaintiff cannot make its assault on a matter said not to be within the jurisdiction of the Commission, when adjudication must turn on matters which are within its jurisdiction.* . . ."

A leading commentator on the matter has developed this point as follows:

> ". . . [T]here is an important distinction between motions to stay or dismiss based on primary jurisdiction and those founded on other grounds. In the latter situation facts properly pleaded are considered to be admitted for the purpose of the motion; in the former such facts are not viewed as so conclusive as necessarily to render the doctrine inapplicable. . . . [T]he face of a complaint is not necessarily binding when a motion against the complaint based on primary jurisdiction is made. It is generally recognized that an act

> legal under the regulatory statute cannot constitute a violation of the antitrust laws. This being so, the pleader should not be able to oust the jurisdiction of the agency simply by alleging a conspiracy or by alleging activity of such a nature that it is clearly unlawful whatever the standards governing competition in the industry may be. . . ." von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction,* 67 Harv. L. Rev. 929, 943-45 (1954) (footnote omitted)

Thus, if the conduct to which the complaint relates is within the ambit which Congress has declared should be regulated administratively, the matter is outside the jurisdiction of the court.* Similarly, if the administrative agency has determined that the conduct alleged is in the public interest that conduct does not become a violation of the antitrust laws because the pleader characterizes it as a "boycott", an "attempt to monopolize" or a "tie-in".

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* Even where this Court has found that a practice could not be sanctioned under the regulatory act, when an antitrust suit has been brought with respect to such practice, the Court has held that prior consideration by the Board is required. See *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958); *Far East Conference* v. *United States*, 342 U.S. 570 (1952).

II.

The complaint purports to charge Toolco with a violation of the antitrust laws solely by reason of its conduct in the furnishing of aircraft and financing to TWA.

Counsel for TWA, in referring to the violations of the antitrust laws alleged in the complaint, stated to the District Court: "The crux of such violations rests upon Toolco's acts and efforts, through the exercise of its stock control over TWA, to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing therefor. . . ." (f. 134)

TWA's chief executive officer on deposition described the complaint as "based upon the fact that Mr. Hughes had preempted to himself the procurement of planes and the financing of TWA's operations." (See Toolco's Main Brief at p. 89).

Since the exercise of control by a parent over the procurement policies of its subsidiary hardly constitutes a basis for claiming a violation of the antitrust laws, TWA in its brief attempts to create the impression that Toolco has engaged in the business of supplying aircraft and financing to air carriers other than TWA. Such an effort necessarily fails because (1) the dominant facts alleged in the complaint relate exclusively to the supplying of aircraft and financing by Toolco to TWA, and (2) Toolco has never been a supplier of aircraft to air carriers generally. The

efforts of TWA to draw a contrary conclusion from the record are based upon a distortion of what appears therein.

There is no allegation in the complaint that Toolco has sold or leased any aircraft to any air carrier other than TWA.* Nor is there any allegation in the complaint that Toolco has supplied any financing to any air carrier other than TWA.

The claimed restraints of trade relate solely to the supplying of aircraft to TWA:

(a) The alleged boycott is a boycott by TWA of all suppliers of aircraft other than Toolco;

(b) The alleged tie-in is with respect to aircraft to be furnished to TWA with financing for such aircraft;

(c) There is no allegation of any monopolization or attempt to monopolize that part of the market for aircraft represented by the requirements of carriers other than TWA; and

(d) The alleged conspiracy with Atlas Corporation had as its alleged objective the enlarging of TWA's requirements for aircraft.

TWA's brief argues that what in fact Toolco foreclosed was a substantial segment of "the entire U.S.

* Six Boeing aircraft are alleged to have been "diverted" to TWA's principal transatlantic competitor (A13) and a lease of six Convair aircraft to have been "arranged" by the defendants (A14). These carefully chosen words are designed to obscure the fact that the sale and lease were made by the manufacturers and not by Toolco. The details of these transactions as shown in the record are set forth in Annex A hereto. This Annex also corrects various other of the more flagrant errors and misstatements with respect to the supplying of aircraft contained in the Counter Statement of the Case in TWA's Brief.

market for U.S. manufactured civilian jet transport aircraft generally" and "the entire U.S. market for U.S. manufactured civilian transport aircraft" (TWA Br. 138). However, the next paragraph of TWA's brief makes it plain that all that the complaint is talking about is the "preclusion" caused by Toolco's control over the furnishing of aircraft to TWA: "The percentages of preclusion alleged [in these markets] ranged from about 12.5% of all aircraft sold to U.S. flag carriers (based on TWA's 12.5% of passenger-miles flown in 1960 by scheduled U.S. flag carriers) to 100% of TWA's total jet aircraft requirements." (TWA Br. 138).

Obviously TWA is now embarrassed by the absurdity of its claim that Toolco could violate the anti-trust laws by furnishing aircraft to TWA. In light of the undisputed fact that Toolco has never been a manufacturer of transport aircraft and thus has not been in competition with those who do manufacture aircraft for air carriers, it is difficult for TWA to devise any restraint of trade at all. Competition among manufacturers is no more restrained if the needs of TWA for aircraft are filled through orders placed by its parent Toolco than if the orders are placed by TWA. On the face of the complaint it appears that TWA acquired Boeing jet aircraft and Convair jet aircraft. Boeing and Convair were therefore not excluded from the TWA market. No air carrier bought aircraft from all manufacturers. There is no "boycott" of suppliers of aircraft or "tying arrangement" or "attempt to monopolize" unless trade among competitors is restrained. Here it was not.

For TWA to claim, as a way out of its dilemma, that Toolco was a supplier of aircraft to air carriers generally would be a fraud on the Court in the face of the facts which are of public record. The attached TABLES summarize information contained in public records of the CAB and demonstrate that Toolco had not sold or leased a single aircraft to a trunk carrier other than TWA prior to the filing of the complaint.*

III.

The jurisdiction of the courts over the antitrust violations charged by TWA has been superseded by the CAB's regulatory regime; and the CAB's orders provide a defense against those claims.

It is the position of petitioners:

(1) That possible restraints of trade, by persons engaged in a phase of aeronautics with respect to an air carrier controlled by them, is a subject which has been entrusted by Congress to the regulatory regime of the Board, and hence the antitrust laws are not directly enforceable with respect to such restraints; and

(2) That through its two orders permitting Toolco to control TWA, and through its 18 orders approving *all* the aircraft acquisition and financing transactions between Toolco and TWA, the

* Since that date the only such sale or lease of aircraft by it has been that of four aircraft leased to Northeast Airlines, Inc. ("Northeast") after Toolco had acquired control of Northeast with CAB approval. These leases were approved by the CAB (see Order No. E-20989 (June 25, 1964)).

TABLE I

TOTAL ACQUISITIONS OF JET AIRCRAFT BY U. S. DOMESTIC TRUNK CARRIERS AND PAN AMERICAN

To December 31, 1960[1]

	Acquired From Aircraft Manufacturers			Acquired From Other "Suppliers"			
Carriers:	Boeing (707; 720)	Convair (880)	Douglas (DC-8)	Jetair Inc.	Sub Total	Toolco	Total
American	35	—	—	—	35	None	35
Braniff	4	—	—	—	4	None	4
Continental	5	—	—	—	5	None	5
Delta	—	8	6	—	14	None	14
Eastern	—	—	11	—	11	None	11
National	—	—	3	—	3	None	3
Northeast	—	4	—	—	4	None	4
Northwest	—	—	4	—	4	None	4
Pan Am	29	—	16	1[2]	46	None	46
TWA	—	—	—	—	—	28[3]	28
United	13	—	32	—	45	None	45
Western	—	—	—	—	—	None	—
Total	86	12	72	1	171	28	199

1 *Source:* Schedules B-7 and B-43 to CAB Form 41 Reports filed quarterly by the above-mentioned air carriers and agreements filed with the Agreements Section of the CAB. See 14 C.F.R. § 241.22. Includes leasing arrangements other than interline leases. For example, Boeing 707 aircraft were leased to National and Northeast by Pan Am and TWA, respectively.

2 One DC-8 was leased by Pan Am from Jetair. Jetair was formed in April 1960 by Panagra and W. R. Grace & Co. 1962 Moody's Transportation Manual, p. 1329.

3 Includes 7 Boeing aircraft purchased from Boeing under contracts assigned to TWA by Toolco. Of the remaining 21 aircraft, 20 are Boeing 707s and one is a Convair 880.

TABLE II

TOTAL ACQUISITIONS OF JET AIRCRAFT BY U.S. DOMESTIC TRUNK CARRIERS AND PAN AMERICAN

To September 30, 1964[1]

	Acquired From Aircraft Manufacturers				Acquired From Other "Suppliers"				
Carriers:	Boeing (707; 720; 727)	Convair (880; 990)	Douglas (DC-8)	Sud (Caravelle)	Other Air Carriers[1]	Miscellaneous Suppliers	Sub Total	Toolco	Total
American	70	20	—	—	—	—	90	None	90
Braniff	9	—	—	—	1[2]	—	10	None	10
Continental	13	—	—	—	—	—	13	None	13
Delta	—	17	13	—	—	—	30	None	30
Eastern	23	—	15	—	—	11[3]	49	None	49
National	—	—	11	—	—	—	11	None	11
Northeast	—	6[4]	—	—	—	—	6[4]	4[5]	10[4]
Northwest	25	—	5	—	—	—	30	None	30
Pan Am	52	—	19	—	2[2]	1[6]	74	None	74
TWA	42	6[4]	—	—	—	8[7]	56	47[8]	103
United	50	—	42	20	—	—	112	None	112
Western	12	—	—	—	—	—	12	None	12
Total	296	43[4]	105	20	3	20	487[4]	51	538[4]

1 *Source:* Schedules B-2, B-7 and B-43 to CAB Form 41 Reports filed quarterly by the above-mentioned air carriers, and agreements filed with the Agreements Section of the CAB. See 14 C.F.R. § 241.22. Includes leasing arrangements other than interline leases. In order to avoid double counting, transactions among the enumerated air carriers have been excluded from the computations. For example, Eastern has leased from Pan Am four DC-8s and Northwest has sold four DC-8s to National.

2 One Boeing 720 was purchased by Braniff from Aerlinte Eirann Teoranta and two 720s were purchased by Pan Am from Lufthansa.

3 Ten Boeing 720s were leased by Eastern from the Prudential Life Insurance Co. and one DC-8 from Bank of America. The agreement between Eastern and Prudential was filed with the Securities & Exchange Commission on May 1, 1961, and discloses that the transaction was entered into to enable Eastern to carry out its contract with Boeing to purchase these aircraft.

4 These aircraft were leased by Convair to Northeast beginning in 1960; in 1963 all of the aircraft were repossessed by Convair and sold to TWA; thus only one of the transactions is included in the totals.

5 Four CV-880s owned by Toolco have been leased to Northeast pursuant to CAB approval. See Order E-20989 (June 25, 1964).

6 One DC-8 was leased by Pan Am from Jetair. Jetair is a corporation which was formed in April 1960 by Panagra and W. R. Grace & Co. 1962 Moody's Transportation Manual, p. 1329.

7 Five Boeing 707s were leased by TWA from Boothe Leasing Corporation between November 1, 1962 and March 12, 1963. Boothe is a subsidiary of The Greyhound Corporation and leases ". . . equipment purchased from manufacturers chosen by [the] lessee. . . ." 1964 Moody's Transportation Manual, p. 1173. Three Boeing 707s were purchased from See Jet, Inc. in 1964. On December 26, 1963 the CAB held the proposed conditional sale arrangement exempt from Section 408 of the Act. Order E-20304. These aircraft were originally ordered by TWA from Boeing.

8 This includes 19 Convair and 7 Boeing jet aircraft acquired by TWA directly from the respective manufacturers under contracts assigned to TWA by Toolco in December 1960. (A-215-27). Of the remaining 21 aircraft, 20 are Boeing 707s and one is a Convair 880.

TABLE III

TOTAL ACQUISITIONS OF PROPELLER AIRCRAFT BY U.S. DOMESTIC TRUNK CARRIERS AND PAN AMERICAN

From January 1, 1950 to September 30, 1964[1]

	Acquired From Aircraft Manufacturers						Acquired From Other "Suppliers"				
Carriers:	Boeing (377)	Convair (220; 440)	Douglas (DC-3; DC-4; DC-6; DC-7)	Lockheed (049; 649; 749; 1049; 1649; Electra)	Martin (202; 404)	Vickers (Viscount)	Other Air Carriers[1]	Misc. Suppliers	Sub Total	Toolco	Total
American	—	—	88	35	—	—	1[3]	—	124	None	124
Braniff	—	30	10	11	—	—	4[4 & 5]	6[3 & 6]	61	None	61
Continental	—	10	8	—	—	15	—	2[3]	35	None	35
Delta[2]	—	28	22	6	—	—	—	5[6]	61	None	61
Eastern[2]	—	20	49	80	60	—	—	5[3]	214	None	214
National	—	9	18	18	—	—	—	—	45	None	45
Northeast	—	—	10	—	—	11	—	6[3]	27	None	27
Northwest	—	—	26	21	—	—	7[3]	12[3]	66	None	66
Pan Am	—	4	73	—	—	—	6[3]	1[3]	84	None	84
TWA	—	—	—	55	52	—	5[7]	3[4]	115	55[8]	170
United[2]	2	54	106	8	—	69	7[4]	4[3]	250	None	250
Western	—	—	32	12	—	—	—	—	44	None	44
Total	2	155	442	246	112	95	30	39	1126	55	1181

1 *Source:* Schedules B-7 and B-43 to CAB Form 41 Reports filed quarterly by the above-mentioned air carriers. See 14 C.F.R. § 241.22. Includes leasing arrangements other than interline leases. In order to avoid double counting, transactions among the enumerated air carriers have been excluded from the computations.

2 Includes acquisitions by predecessor airline companies (Chicago & Southern, Colonial and Capital).

3 Douglas aircraft were made available to certain of the carriers by the following "suppliers": *U.S. Government* (3 to Eastern; 1 to Pan Am); *Advance Industries* (2 to Braniff; 1 to Continental); *Air Transport Carrier* (8 to Northwest); *Fred B. Ayers & Associates* (6 to Northeast); *International Airports* (1 to Continental); *John Meela Industries* (1 to Northwest); *Los Angeles Air Service* (2 to Braniff; 1 to Northwest); *Pacific Air Motors Corp.* (2 to Northwest); *Salem Engineering Corp.* (2 to United); *Texas Engineering Manufacturing Co.* (2 to Eastern); *U.S. Steel Corp.* (2 to United); *Philippine Air Lines* (1 to American); *Transocean Air Lines* (2 to Northwest); *Canadian Pacific* (2 to Northwest); *Compagnia Mexicana de Aviacion, S.A.* (2 to Northwest and 1 to Pan Am); *Aerovias Guest* (1 to Northwest); *Slick Airways* (2 to Pan Am); *Panair* (3 to Pan Am).

4 Lockheed aircraft were made available to certain of the carriers by the following "suppliers": *U.S. Government* (1 to TWA); *Master Equipment Co.* (2 to TWA); *BOAC* (7 to United); *Viasa Int'l Airways* (2 to Braniff).

5 Two Convair aircraft were made available to Braniff by Philippine Air Lines.

6 Curtis-Wright aircraft were made available to certain of the carriers by the following "suppliers": *L. B. Smith & Co.* (2 to Braniff); *Robert Hewitt Associates* (5 to Delta).

7 Five Martin aircraft were made available to TWA by Pacific Air Lines, Inc.

8 This figure consists of the following equipment manufactured by Lockheed: six L-049s, two L-649s and one L-749, eight L-1049s and twelve L-1649s sold by Toolco to TWA (see A-179, A-183, A-185); thirteen L-1649s assigned to TWA under contract between Lockheed and Toolco (A-185); the sublease of five L-1049s from Toolco and the guarantee by Toolco of TWA's obligations arising from the purchase of four L-1049s and four L-1649s from Lockheed (R. 359-64; A-196).

Board exempted from the antitrust laws the very conduct which underlies TWA's allegations of antitrust violations.

A. The provisions and legislative history of the Act confirm that the jurisdiction of the courts over the antitrust claims charged by TWA has been superseded by the Board's regulatory regime.

The legislative history of the Federal Aviation Act (reviewed at pp. 53-61 of Toolco's Main Brief) fully reflects the Congressional intent that the antitrust laws should have no application to assistance given to an air carrier by one who acquires control of that carrier with CAB approval. Congress relaxed the absolute prohibition in the Air Mail Act of 1934 against control of an air carrier by a person engaged in a phase of aeronautics. It did so for good reason. Congress recognized that despite the evils which had arisen in the past from control of air carriers by aircraft manufacturers, the assistance which could be given by a person engaged in a phase of aeronautics to a fledgling airline would result in strengthening the air transport industry and in fostering sound competition among air carriers.

The Toolco-TWA relationship exemplifies why Congress permitted one engaged in a phase of aeronautics to acquire control of an air carrier free from the antitrust laws with respect to restraints which might arise from the exercise of control. The policy permitted TWA's growth and the establishment of TWA as an effective competitor, particularly in the

international field.* This growth and the competition fostered thereby were made possible by the contributions of Toolco in the supplying of equipment and financing to TWA, the very conduct which TWA's present management claims was interdicted by the antitrust laws.

In the period from 1939 through 1960 TWA acquired equipment valued at more than $370 million either with Toolco's financial assistance or through Toolco; the total of Toolco's guarantees (including guarantees of loans and contracts, underwritings of public offerings, and guarantees of working capital or net worth) exceed $220 million and Toolco made cash loans to TWA of $110 million.**

It cannot be a coincidence that the order of the CAB which authorized Toolco—a dealer in aircraft by virtue of the contracts it had made for Constellation aircraft—to control TWA was entered only a few months after TWA had applied for a certificate to compete with the dominant flag carrier, Pan American, and its smaller competitor, American Overseas Airlines, in the transatlantic trade. The

* The growth of TWA under the control of Toolco may be shown by the following statistics taken from the 1960 Annual Report of the CAB, the 1940 financial statement of TWA (see f. 20541), and the Handbook of Airline Statistics (CAB 1963):

	1939	1960	% Increase
Route Miles	6,000	60,000	900%
Revenue Pass. Miles	100,195,000	5,490,000,000	5,400%
Net Worth	$ 5,300,000	$ 126,000,000	2,300%
Total Assets	$10,000,000	$ 453,000,000	4,400%
Operating Revenue	$ 7,906,000	$ 377,000,000	4,700%
Net Profit (loss) before taxes	($ 188,000)	$ 15,219,000	—

** No elimination has been made for duplication among the three categories. See Annex B, *infra*.

CAB approved TWA's international certificate in July 1945, and as the CAB recognized in approving Toolco's acquisition of further control, TWA would not have met the burdens imposed by the commencement of international service without the assistance of Toolco in the acquisition of aircraft and financing. Cf. *Trans World Airlines, Inc., Further Control by Hughes Tool Co.*, 12 C.A.B. 192 (1950). The subsequent order of the CAB which approved the increased control was entered in October 1950, only a few months after Pan American was permitted to purchase American Overseas Airlines under a stern injunction from President Truman that TWA's competitive position must be preserved in the national interest.*

TWA's competitive position was preserved and improved by Toolco's assistance and under Toolco con-

* The President's letter reads as follows:

"July 10, 1950

"My dear Mr. Ryan:

"I have considered the letters from you and the other Board members in response to my request of June 30, 1950, in the North Atlantic Route Transfer Case.

"My objective is to accomplish a route pattern in which our nation may have the benefit of competition to the principal traffic points in Europe, and to avoid a monopoly on the part of either of the United States carriers.

"It is apparent that, as traffic points, London, Paris, Rome, and for the time being Frankfurt are the leading European cities. Therefore I desire that both remaining carriers be authorized to serve each of these points. In the case of Rome, which one of the carriers now serves both on its Shannon and its Lisbon routes, the other carrier should be similarly authorized. As to Frankfurt which is a principal air traffic point during and principally because of the American occupation of Germany, the TWA is to serve Frankfurt until the Board shall find that such service is no longer required in the interests of the American occupation of Germany.

"This adjustment should result in the fullest accomplishment

trol. However, in 1963 the lender-controlled management of TWA entered into an agreement with Pan American which would have provided for a consolidation of the operations of the two airlines.*

The intent of Congress to promote the growth of the industry is reflected in the basic policy statement found in Section 102 of the Act. One of the ways this was to be accomplished was by authorizing the Board to permit assistance to air carriers by persons engaged in a phase of aeronautics free from the restraints imposed by the antitrust laws. Thus, Congress in Section 414 of the Act provided immunity from all provisions of the antitrust laws.

TWA would frustrate the Congressional intent by limiting the immunizing effect of the Board's orders

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of the broad national objectives which, especially at this critical time, should govern the development of United States air transportation and will provide for vigorous competitive growth by our air lines.

"It is most important that this matter be disposed of in the present proceeding without further delay in order that the carriers concerned may immediately go forward with plans for their needed further development.

"Therefore, I have decided to approve the sale of American Overseas Airlines with the route adjustments set forth above. Please submit an order at once.

"Very sincerely yours,

"(Sgd.) Harry S. Truman

"Mr. Oswald Ryan
Acting Chairman
Civil Aeronautics Board
Washington 25, D. C."

Trans World Airlines v. *CAB*, 184 F.2d 66, 69, n.2 (2nd Cir. 1950), *dismissing petition for review of North Atlantic Route Transfer Case*, 11 C.A.B. 676 (1950).

* The application to the CAB for approval of this agreement was withdrawn only after Toolco had filed its complaint with the CAB, alleging *inter alia* that three of the directors of Pan American were also directors of one of the two insurance companies which have the power to control TWA.

authorizing and approving an acquisition of control. The position of TWA appears to be that the transaction resulting in an acquisition of control is immunized from the antitrust laws but that any exercise of the control so acquired is subject to all of the provisions of the antitrust laws. However, both the provisions and the history of the Act demonstrate the fallacy of such a contention.

Certainly the exemption afforded by the Board's control orders was not intended to cover only the making of an investment in an air carrier by a person engaged in a phase of aeronautics. Congress can hardly have intended to immunize from the operation of the antitrust laws that which could not be a violation.* Section 414 necessarily must have intended to immunize an acquisition of control violative of Section 7 of the Clayton Act.

Furthermore, if Congress had intended to limit the exemption afforded by Section 414 to possible violations of Section 7 of the Clayton Act by reason of an acquisition of control it would have said so. That the exemption is from all the antitrust laws is perhaps the most convincing proof of what Congress intended. Congress intended that the controller should be permitted to exercise control free from the restraints which the antitrust laws might impose, subject only to regulation by CAB. It is the responsibility of CAB, and not of the courts, to regulate the control relationship—at least with respect to that

* Section 7 of the Clayton Act by its own terms is inapplicable "to corporations purchasing . . . stock solely for investment and not using the same by voting or otherwise to bring about, or in an attempt to bring about the substantial lessening of competition."

line of trade or commerce constituting the "phase of aeronautics" in which the controller is engaged.

This Congressional purpose is further shown by the exemption afforded to interlocking relationships between a person engaged in a phase of aeronautics and an air carrier, approved under Section 409 of the Act, since control may be exercised through such relationships.

B. Under the statutory scheme the CAB has the power to regulate every aspect of any control relationship which it allows and has done so here with respect to the conduct forming the basis of the complaint.

The Board twice approved Toolco's controlling TWA, noting in its orders that Toolco was a "dealer in aircraft" and was participating in the supplying of aircraft and financing to TWA. However, the Board's approval was subject to a strict condition requiring that Toolco and TWA report, and obtain approval of, every commercial transaction between them involving more than $200.

The purpose of this stringent condition clearly was to afford the Board continuing control and surveillance over Toolco's dealings with TWA. It was imposed as an alternative to a condition, suggested by the Board's public counsel, which called for the automatic termination of the control relationship if Toolco engaged in certain commercial transactions with TWA. (R. 663, R. 701; Toolco Main Brief, pp. 14-15).

Under the conditions imposed by the Board, Toolco was not free to enter into any arrangement with

TWA—including any whereby it would become the sole supplier of aircraft or financing—without obtaining Board approval since every transaction was subject to obtaining approval by the Board. Furthermore, it would be a violation of the orders of the Board, and therefore of the Act, to obtain approval of any transaction between Toolco and TWA without submitting to the Board all relevant aspects of each such transaction.

There has in fact been no allegation by either TWA or the Board that there were any secret, unreported transactions between Toolco and TWA, and in the light of the regulatory goldfish bowl in which this relationship has existed, there could hardly have been any. TWA expressly states that: "TWA does not contend that the Federal Aviation Act has been violated or that it is entitled to any remedy thereunder with respect to defendants' practices." (Br. p. 12). Similarly, the Board has specifically found that Toolco did not violate the Act in its relations with TWA (Memo p. 18).

The CAB agrees that its control orders and various modifications thereof "permited Toolco to sell or lease equipment to TWA and to participate in the financing of TWA's acquisition of equipment" (Memo p. 4). The Board by eighteen separate transactional orders approved all the aircraft acquisition and financing transactions between Toolco and TWA.* The Board

* Except for the very early orders, the orders uniformly state that they "permit" the transactions requested. All the orders, in permitting a specific transaction of a type prohibited by the control order, obviously bring into play the language of § 414 which provides an antitrust exemption "to enable such person to do anything *authorized*, approved, or required by such order." (emphasis supplied)

does not dispute that these orders exempted from the operations of the antitrust laws the transactions which it authorized and approved.

The CAB cautiously insists that it did not exempt any transactions, agreements, or understandings other than those which it approved. But, as previously indicated, by admitting that Toolco has not violated the Act, TWA confirms what is the fact: That there were no transactions, agreements, or understandings not submitted to the CAB, and no relevant aspects of the transactions, agreements, or understandings which were submitted which were not revealed.*

As the memorandum of the CAB recognizes (p. 13), the CAB may at any time terminate a control relationship "if, upon inquiry, it finds abuses of control which require such corrective action in the public interest."

It is important to note that CAB also states:

> *"The Board's failure to initiate an investigation into Toolco's control relationship may be taken as reflecting the Board's judgment that, at that time and on the facts available to it, Toolco had not misused its control."* (Memo p. 18). *Cf. Toolco-Northeast Control Case,* Docket 11620, (Order E-18470) (R. 833).

Any material change in the phase of aeronautics in which Toolco was involved, or the suggestion of any such change, would be grounds for the Board's open-

* The complete chronology of the Toolco-TWA relationship as reported to the CAB is summarized in Annex B, *infra.*

ing up its orders permitting the control relationship. (Toolco Main Brief, p. 49.)*

Toolco does not contend, as the CAB suggests, that the CAB has the duty to supervise the day-to-day management of the carrier or to monitor every exercise of control. But the least the CAB knew was when and from whom and on what terms TWA acquired aircraft and when and on what terms Toolco supplied financing to TWA.

Moreover, TWA has been free, and is today free, to present to the CAB any facts of which it claims the CAB is not aware and which it believes would permit or require the Board to modify any of its outstanding orders. TWA has not done so. So long as these orders remain outstanding the antitrust laws have no application to the conduct alleged in the complaint.

One shocking aspect of TWA's brief is its denigration of the transactional orders, which approved all the equipment supplying and financing transactions between Toolco and TWA. TWA points out that the orders were entered in most cases without an evidentiary hearing or oral argument. (TWA Br. p. 114) Even the Board sees fit to comment that "the orders were entered solely on the basis of motions filed by TWA and without hearings or adversary pleadings." (CAB Memo. p. 4)

* It will be recalled that when, in 1956, Toolco gave consideration to engaging in the manufacture of jet aircraft, the Board entered into an investigation of the matter under § 408(e) with a view toward considering whether a specific approval of the change in activities of Toolco as a controlling party should be required under § 408(b). (See Toolco Main Brief, pp. 27-28).

But these procedures were those which the Board itself established for the consideration of proposals for Toolco to supply equipment or financing to TWA, and the procedures are perfectly adequate. An application was submitted which set forth the proposed transaction.* Upon its filing, the application was a matter of public record. The applications were publicized to the aviation industry.** Each of the applications was subject to scrutiny by the Board's staff, and after formulation of the staff's recommendations, by the Board itself.

If anyone had been "foreclosed" from the "TWA market", he would have had ample opportunity to contest any of the applications. The Board's Rules of Practice provide for the filing of answers in opposition to applications (14 C.F.R. § 302.6); late filing of such answers on a showing of good cause (14 C.F.R. § 302.4(f)); petitions for reconsideration (14 C.F.R. § 302.37); petitions to intervene (14 C.F.R. § 302.15); statements of position (14 C.F.R. § 302.14); and general motions (14 C.F.R. § 302.18).

The Board had full discretionary authority to set down any of the transactional applications for a full

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* TWA points to one of the applications and makes some point of the fact that it was only two pages long and had attached to it only two short exhibits. (TWA Br. pp. 30-31) But the application chosen relates to a very simple transaction. The application was appropriately detailed in view of the subject matter. Other applications dealing with more complex transactions are much lengthier and contain all the appropriate details as to them. See, *e.g.*, R. 241-74, R. 292-332, R. 427-90.

** Written notice of them was published in the weekly CAB Form R-405, a list of "Applications And/Or Amendments Thereto Filed With The Civil Aeronautics Board During The Week," which is given publicity throughout the industry.

public hearing, on the request of its Staff, on its own motion, or on opposition by a party in interest. In short, the transactional orders were, although entered pursuant to a suitably flexible administrative procedure, entered under circumstances which fully protected the rights of anyone who wished to oppose them.

The Board does not deny that these orders carry with them an exemption from the antitrust laws under § 414 of the Act, touching the transactions to which they relate. A demonstration of how little of substance can be said against the exemptive effect of these orders is found in the fact that TWA finds need to refer repeatedly to the recital in the orders that the Board was not passing upon the reasonableness for rate-making purposes. This point might have some relevance if the present case were a rate-making case; however, it purports to be an antitrust case.

IV.

The prayer for treble damages does not vest the District Court with jurisdiction.

A. Another fallacious assertion in the briefs of the Board and TWA is that the prayer for treble damages —a form of relief which the Board cannot grant— confers jurisdiction upon the District Court.* How-

* TWA blandly asserts:

"... The only remedy ordered by the ruling now under review is the payment of money by defendants to TWA to compensate it for the harm done it and its independent stock-

ever, since the orders of the Board have exempted the conduct of which TWA complains from the operation of the antitrust laws, that conduct could no more be made the basis of an award of damages than it could have been made the basis of an injunction.

Assuming, *arguendo*, that TWA's complaint is concerned with conduct of Toolco involved in furnishing aircraft and financing to TWA which was not approved by the CAB, it would nevertheless relate to matters within the regulatory regime of the Board. The rationale of the classic cases does not suggest that supersession depends on the remedy available, but rather on the effect of the agency's regulatory regime, and its exemptive orders, upon the antitrust laws. See *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485 (1932); *Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 313, n. 19 (1963).* It is therefore, a futile

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holders by Toolco's monopolization of and restraints upon the supply of the jet planes and financing it needed. The granting of such relief neither impairs the exercise of any Board function nor interferes with any uniformly applied policy or coherent structure which the Board administers." (TWA Br. p. 101) (footnote omitted)

* Similar arguments—that the award of damages under another set of laws, as opposed to the grant of injunctive relief, somehow does not disturb a regulatory regime—used to be made in supporting the jurisdiction of state courts to award damages in areas in the labor relations field in which the National Labor Relations Board moved. This Court gave the conclusive answer to such a contention in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The Court pointed out:

"Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state

maneuver to include a prayer for treble damages in an attempt thereby to confer jurisdiction on the court. *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 102 F.Supp. 685 (S.D. Calif. 1952), *aff'd*, 209 F.2d 380 (9th Cir. 1953).

For example, in a case asserting a claim for treble damages with respect to conduct which had not been considered by the appropriate regulatory agency, the court ordered dismissal of the complaint. *Carnation Co.* v. *Pacific Westbound Conference*, 336 F.2d 650 (9th Cir. 1964), *cert. pending*, No. 657, October Term, 1964. In that case the court stated:

> ". . . the considerations which make up the rationale of Cunard and Far East are fully as applicable in a treble damage suit as in one seeking injunction. Preliminary resort to the Commission is as necessary here in order to secure the uniformity of application of the Congressional scheme . . . ." (336 F.2d at 655)

This Court has affirmed the holding that the question whether an agency can grant the particular remedy which a private litigant is seeking is not determinative of the issue whether a regulatory regime supersedes the antitrust laws. In *Luckenbach S.S. Co.* v. *United States*, 179 F. Supp. 605 (D. Del. 1959), the plaintiff attempted to defeat the superseding regulatory regime of the Interstate Commerce Commission by seeking forms of relief which the Commission

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regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. . . ." (359 U.S. at 246-47)

could not give. The three-judge district court commented:

> "'(1) On the question whether the doctrine applies to problems or relief which are beyond administrative jurisdiction, the theory seems reasonably clear. . . . Because of the purpose of the doctrine—to assure that the agency will not be by-passed on what is especially committed to it—and because resort to the courts is still open after the agency has acted, the doctrine applies even if the agency has no jurisdiction to grant the relief sought. . . .
>
> "The sole question remaining is whether to dismiss or retain jurisdiction of the antitrust charges. The preferred procedure is to dismiss. . . ." (179 F. Supp. at 613-14).

On the plaintiff's appeal from the dismissal, this Court affirmed the dismissal *per curiam* as to "the antitrust phase of the dispute." *Luckenbach S.S. Co. v. United States*, 364 U.S. 280 (1960).*

Indeed, TWA's insistence that the availability of the remedy is the determining factor leads it to make the astounding point that there should be no supersession because, if an antitrust treble-damage suitor were forced to resort to the Board, the Board might not simply apply the antitrust laws themselves, but "other and different factors may take precedence in

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* The commentators seem to be in agreement that the nature of the relief requested does not affect the supersession question. See, *e.g.*, Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. Pa. L.Rev. 577, 579-80 (1954); von Mehren, *supra*, 67 Harv. L.Rev. at 945; Notes, 64 Harv. L.Rev. 1154, 1167 (1951); 77 Harv. L.Rev. at 166 (1963).

the Board's deliberations and findings." (TWA Br. p. 105)

This is, of course, the very point: The potentially anticompetitive implications of the exercise of control by an aircraft supplier or other party engaged in a "phase of aeronautics" over an air carrier is a matter which the Board has the power to regulate. In exercising its regulatory powers, the Board must take into account the policy of the antitrust laws; but its ultimate legal determination can not be based solely on those laws.*

B. Closely related to the contention that the prayer for treble damages somehow avoids the operation of the supersession doctrine, or would permit a court to ignore the exemptive force of Section 414 of the Act, is the suggestion by TWA that the presence of the prayer for treble damages, in any event, would require that the District Court not dismiss the action but simply stay it pending action by the Board. (TWA Br. p. 103). But, even if a reference to the Board were required, the appropriate procedure in a supersession case is not a stay but a dismissal of the complaint without prejudice to its reinstitution after the administrative processes have been exhausted.**

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* Paradoxically, while TWA says there should be no supersession because the Board might apply standards different from those of the antitrust laws, the Board says that there is no supersession because the Board "could only be expected to follow judicial precedent." (Memo., p. 19) The Board's statement is, in view of the powers vested in it under the Federal Aviation Act to consider factors other than the competition factors in arriving at its "public interest" determination—provided that the antitrust factors are not of such magnitude as to bring into play the proviso of § 408(b)—plainly erroneous.

** TWA contends that, if all that was required was a stay, the judgments below should be affirmed. But as we demonstrated

The most recent case in a court of appeals to consider this question is *Carnation Co.* v *Pacific Westbound Conference,* 336 F.2d 650 (9th Cir. 1964), currently pending before this Court on a petition for a writ of certiorari, No. 657, October Term, 1964. There the Court of Appeals rightly pointed out that the only possible reason for staying the treble-damage action rather than dismissing it was to avoid the running of the statute of limitations. (336 F.2d at 667, n. 32). But, as the court correctly held, inasmuch as the statute could not run, since the plaintiff's cause of action would not ripen until after the administrative proceedings, there was no reason not to dismiss on this ground. Accordingly, that court ordered the complaint dismissed.

This reasoning is clearly correct. There is no reason why actions seeking damages should be treated differently from those seeking equitable remedies, nor is there any reason why actions which cannot be prosecuted should be permitted to remain on the calendars of the federal courts. Section 4(b) of the Clayton Act, 15 U.S.C. § 15(b), establishes that an action for treble damages must be "commenced within four years after the cause of action accrued." But "it cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer* v *Chapman,* 119 U.S. 587, 602 (1887); *United States* v *Wurts,* 303 U.S. 414, 418 (1938).

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in our Main Brief (p. 88, n. 3), in the present posture of the case, even a holding by this Court that proceedings on the complaint should have been stayed pending a reference to the Board should not result in an affirmance of the judgments of the lower courts.

The cause of action does not accrue until the time when one "might have successfully maintained . . . [the] suit." *Peak* v. *United States*, 353 U.S. 43, 45 (1957). As this Court said in *Peak*, this is the common sense of the matter, and "common sense often makes good law." *Id.* at 46.

Accordingly, the courts have repeatedly held that when an administrative determination is a necessary prerequisite to a suit in court, the statute of limitations does not run until it has been obtained. As Judge Davis has said in his full consideration of the point in *Friedman* v. *United States*, 310 F.2d 381, 390 (Ct. Cl. 1962), *cert. denied*, 373 U.S. 932 (1963):

> ". . . where an administrative decision is mandatory the claim is not ready for suit until such a decision is had or is excused. That is the condition precedent to the accrual of the cause of action. . . ."

Or, as Judge Wright put the matter in *N. V. Phillips Glocilampenfabrieken* v. *AEC*, 316 F.2d 401, 406 (D.C. Cir. 1963):

> ". . . when . . . the claimant must first present his claim to an executive tribunal, the right of action does not accrue until the executive tribunal has acted on the claim. . . ."*

Obviously, there is no reason for the policy of the statute of limitations to operate where a timely application is in fact made before the administrative agency.

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* See also *Missouri Pac. R.R.* v. *Austin*, 292 F.2d 415, 419 (5th Cir. 1961).

Conclusion

For the reasons stated in this reply brief and in Toolco's Main Brief, the judgment of the Court of Appeals should be reversed and the cause remanded to the District Court with instructions to dismiss the complaint.

Respectfully submitted,

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ANNEX A

Facts With Respect to Various Misstatements by TWA

Although most of the so-called facts contained in the counterstatement of the case in TWA's Brief are irrelevant to a determination of the issues before the Court, nevertheless because of the number of erroneous and misleading statements contained therein, Toolco submits this Annex containing the facts of record and public record, so that the Court will not be misled.

I. As to the alleged diversion of jet aircraft to Pan American

Notwithstanding that TWA charges in its complaint that "defendants caused six of the Boeing jet-powered aircraft then on order by Toolco to be diverted to the principal transatlantic competitor of TWA" (A13) and argues in its brief to this Court that such transaction would indicate that Toolco was a supplier of aircraft generally (pp. 24-25), the undisputable record is quite to the contrary. The testimony of TWA below as well as matters of public record establishes the following:

During the first half of 1959, in the course of work on the TWA jet financing plans, it was determined by TWA management that TWA desired to limit its initial purchases to twenty-five of the Boeings (fifteen 131s and ten 331s) and twenty of the Convair 880s on order by Toolco; this determination was in accord with the views of Thomas, TWA's then president,

that the industry had "bought" an excessive amount of jets, that TWA would be at a competitive advantage by taking the minimum number of jets initially and, after an evaluation of operations, acquiring superior models of aircraft which would then be available (see A521-22, A525-33, A760-65, R. 1072-76; see also f. 20898). Thereafter, with the prior approval of Thomas and the concurrence by TWA's directors, Toolco transferred to Pan American its rights to acquire six of the excess 707-331s then under construction at Boeing. (See R. 1364-65, A523-26).*

In July, 1959 Boeing consented to the transfer by Toolco to Pan American of its orders for these aircraft. (Registration Statement of Pan American World Airways dated June 29, 1959, p. 11).** Boeing's consent was mandatory due to the fact that under the purchase agreement between Boeing and Toolco the latter could not, without the prior written consent of Boeing, assign its rights under the agreement or enter into a sale or lease or a contract for the

* On October 12, 1959, Mr. Cocke, senior vice-president of TWA, testified in the *Southern Transcontinental Service Case*, Docket No. 7984. On examination by Bureau Counsel, Cocke confirmed that the management of TWA had concluded that "ten to twelve of the 707's with their early delivery dates" were sufficient for TWA to use economically; that this information was transmitted to Toolco; and that thereafter Toolco transferred to Pan American its rights to receive six of these long range jets. (Docket 7984, Tr. pp. 11177-83). In his deposition in the court below, Mr. Cocke reaffirmed the testimony that he gave in the *Southern Transcontinental* case (see R. 1207-26).

** The Registration Statement was filed with the SEC; the agreement with Toolco was filed as Exhibit 13T.

sale or lease of the aircraft prior to delivery thereof to anyone save TWA.*

II. As to the contention regarding the lease of Convair 880s to Northeast

During May 1960 and in connection with an agreement between Toolco and Atlas looking toward the merger of their respective subsidiaries, TWA and Northeast, Toolco agreed to release six Convair 880s so as to enable Northeast to lease such aircraft from Convair. As a result of these agreements and upon the petition of a competitor of Northeast, the CAB instituted an investigation. *Northeast Airlines, Cancellation and/or Suspension*, 31 C.A.B. 1003 (June 8, 1960). This proceeding was eventually subsumed into the *Toolco-Northeast Control Case*. Therein the findings of the Examiner which were adopted by the Board included that: Northeast had been unsuccessful in numerous attempts to arrange for the purchase of jet aircraft directly from various manufacturers due to the difficulty of obtaining financing for its equipment program; in 1959 Northeast was unsuccessful in arranging for the acquisition from Toolco of aircraft in excess of TWA's requirements; thereafter Convair agreed to lease six 880s to Northeast, but the arrangement was not consummated due to delays in the Convair production schedule; in 1960 Convair

* It is to be noted that TWA charges that the "diversion" was part of Toolco's anticompetitive scheme; on the other hand, the lending institutions who control TWA would attribute this "diversion" to Toolco's inability to finance the purchase of the aircraft.

agreed to lease six 880s to Northeast provided that Toolco would release six of the 30 Convair 880s it had on order; Toolco and Northeast agreed to this and agreed further that if arrangements could not be worked out so that Convair would lease six aircraft to Northeast, Toolco would lease six aircraft to Northeast at the same terms as those previously agreed upon between Northeast and Convair; thereupon Convair and Northeast consummated their leasing agreement.* The Examiner concluded that:

> "A review of all of the facts and circumstances discloses that Toolco's release of six aircraft to [Convair] and advance of $9,500,000 to Northeast was necessary to enable that carrier to put its jet fleet in operation during the 1960 Florida winter season. It is clear . . . Toolco's action in this respect was of substantial benefit to Northeast." (R. 813; footnote omitted.)

In addition to the foregoing the Examiner found that:

> "Toolco evidently ordered ten jet aircraft from General Dynamics for TWA in excess of those finally determined by TWA to be necessary, but there is nothing to indicate that this was more than a mistake in judgment on Toolco's part or that Toolco attempted to make a profit on such transactions at the expense of TWA. Nor does the record disclose that in the operation of TWA,

* The record in the *Toolco-Northeast Control Case* also reveals that it was Convair's position that it would not release Toolco from its commitment to purchase the six 880s unless Toolco would agree to purchase six other Convair jets (see, *e.g.*, NEA Exhibit 502, pp. 21-22).

Toolco managed its operations in such a way that tax benefits which should have inured to TWA were obtained by Toolco." (R. 813).*

III. As to the contention that Toolco supplied Viscounts to Northeast

The charge that "defendants supplied Northeast with ten Vickers Viscount aircraft" (TWA Br. p. 24) is another example of TWA's lack of candor in this proceeding. Rummel testified that what occurred was that Hughes had committed to Vickers for the purchase of fifteen Viscounts for TWA; that TWA decided they did not want the aircraft; that Hughes felt that he had a moral obligation to Vickers; and therefore one of Toolco's executives helped Vickers in their attempt to sell or lease the aircraft; and that

* In that proceeding the Board specifically directed the Examiner to explore the charges raised in TWA's antitrust complaint. See Order No. E-17675, p. 4 (Nov. 8, 1961) (R. 760, R. 764); see also Order No. E-17811, 34 C.A.B. 583, 594-95 (1961) (dissent). Penetrating issues were formulated and detailed evidence was requested (see R. 766-86, and after notice (R. 786-92) a full public hearing pursuant to Section 408(b) was had. The Examiner found that "There is no substantial evidence in this record, and none that would support a finding, that Toolco, in its dealing with either Northeast or in its prior control of TWA, engaged in improper self dealing with either of these two companies or that it engaged in unlawful activities." (R 820). In its order, the Board adopted the findings, conclusions and decision of the Examiner with certain modifications not affecting the portions quoted herein (R 837), and held that it was in the public interest to permit Toolco to acquire control of Northeast. (Order No. E-18470 (June 19, 1962) (R 833), *aff'd sub nom. National Airlines* v. *CAB*, 321 F.2d 380 (D.C. Cir. 1963)).

eventually Northeast purchased ten of these aircraft from Vickers (A639-61; R. 800).*

IV. As to the alleged anticompetitive conditions by reason of the Toolco-TWA relationship

In its brief to this Court TWA appears to find comfort and support for its contentions, primarily from the testimony of Rummel, and attempts to convey the impression that his testimony is conclusive of various sorts of anticompetitive wrongdoing on the part of the defendants. TWA's presentation is totally misleading—in fact testimony of Rummel and other spokesmen for TWA as reported hereinafter is indicative of just how baseless the "antitrust" claim of TWA is.

(1) Rummel testified *in extenso* as to the efforts of TWA throughout the period of Toolco control to acquire the flight equipment best suited to TWA's needs, and how the merits of the various offerings of aircraft by practically every manufacturer thereof in the free

* The remaining examples in TWA's brief (p. 25) of situations in which defendants were acting as suppliers of aircraft are of "plans" and "attempts" by Toolco. The record references supplied to support the examples demonstrate that the examples are largely fictionalized renderings of vague hearsay statements. For example, TWA states that Toolco attempted to sell certain Convair 880's to Northwest. However, its supporting referen consists of a statement in a memorandum of "B. of A.—Gordon" which states with respect to the disposition of 880's in excess of TWA's needs that "*Convair* wants 2 of them for N/W as an inducement for N/W to buy 660's [Convair 990's]." (T-27; emphasis supplied) In any event, with respect to these so-called "plans" and "attempts" TWA does not claim that any of them were ever consummated.

world was considered (See A586-722). He told of the usual practice of aircraft manufacturers working with the various airlines in the development of commercial aircraft, and that TWA—while under the control of Toolco and because of it—was more sought after by the manufacturers and participated even more actively than other carriers in advancing the art of commercial aeronautics (f. 14245-54; f. 14263-85). The advantages to TWA of the competition which Toolco and TWA thus fostered were elaborated by Rummel as follows:

> ". . . [W]hen I was working with Mr. Hughes on equipment matters, with respect to the development of new airplane preliminary designs, advanced models of existing designs, and that sort of thing, we did a great deal of activity and a great deal of exploratory work at the behest of Mr. Hughes, and a great deal of it was exploratory in nature. That is, much of what we did did not result finally in a contract. It may have produced a competitive situation of advantage, it may have produced something that looked good, but didn't really turn out to be a good possibility, and I believe that TWA probably did much more of this than some of the other airlines." (A582)

(2) In the unexpurgated version of Rummel's testimony *he* chooses as an example of the "competitive situation of advantage" the evolution of TWA's acquisition of piston-powered aircraft from Martin (A582). In the late 1940's TWA began to look toward a replacement for its DC-3 short-haul equip-

ment; the only manufacturer then offering twin-engine commercial aircraft was Convair (which was at that time controlled by Atlas Corporation*); after negotiations with Convair were well along it became apparent that Martin was interested in returning to the business; TWA and Hughes were instrumental in getting Martin to go forward with a program; Eastern, who had also been negotiating with Convair became interested in the Martin airplane; with the financial assistance of Toolco,** TWA ultimately acquired by purchase or lease over forty aircraft from Martin (see A583-86, A808-19). Toolco's participation in the transaction was the subject of a CAB order (see A180; R242-74).

(3) In view of TWA's emphatic condemnation that "TWA *never* was permitted to buy Douglas aircraft" (TWA Br., p. 22), the record concerning the decision by TWA to acquire Lockheed Model 1049 aircraft instead, is apropos. The testimony of Rummel and Cocke makes it unmistakably clear that the decision of TWA management was made *notwithstanding that "Mr. Hughes was interested in the Douglas aircraft*

* See *Atlas Corp., Control of Consolidated Vultee*, 9 C.A.B. 921 (1948).

** In order to obtain the consent of Equitable for TWA's acquisition and financing of the Martin contract and for the acquisition of certain aircraft from Lockheed, Toolco agreed to guarantee the sale of at least $10 million of TWA common stock (R245-46, R1357; f. 20756, f. 20776, f. 22123). Thus, pursuant to its agreements with Equitable, Toolco acquired its pro rata share of two TWA common stock offerings during 1952 (f. 20756; f. 22732-35). Compare TWA Br., p. 18. Toolco also agreed to purchase one Martin and one Lockheed plane through TWA (R. 248-52).

rather than the Constellations." (A491; see A477-79, A487-91, A800-07). In fact, Rummel pointed to the negotiations with Douglas and Lockheed as another "competitive situation of advantage." He stated that:

> "For example, I am absolutely certain Donald Douglas, Jr., would say that the only reason on earth that the DC-6B exists, which we did not buy, was TWA's negotiation with Douglas. I don't mean to say that it was not a logical development that would finally have evolved, but it in fact did evolve as a result of our negotiation. There are other cases. . . ." (A583)

(4) Both TWA (Br., pp. 21-22) and the Additional Defendants (Br., p. 19) attempt to cast aspersions upon the second transaction whereby Lockheed aircraft were acquired rather than Douglas; the contract is castigated alternatively as a tax device and an anti-competitive maneuver. The former criticism is both irrelevant and unfounded,* and in point of fact the undisputed record elicited from TWA makes clear that the antitrust characterization is a complete distortion.

The 1954 contract to which Rummel objected was a development contract for a long-range turbo-prop aircraft to be known as the 1449, which in fact was never acquired by TWA (A824, A829, A479). The aircraft

* It should be obvious that if a person were motivated to avoid a tax on unreasonable accumulated earnings, he might do so just as readily and effectively by investing his excess in the securities of an airline as to commit it to a contract to acquire property for that airline.

which TWA did subsequently obtain was the Model 1649A and that production contract was elaborately negotiated with Rummel and counsel for TWA participating in the negotiations (A832-34, A960, A963-64).

During the course of negotiations of the contract for the 1649As, "Lockheed had represented frequently, and with a loud voice . . . that the aircraft would be the fastest, longest range, most attractive airplane built, and would be better than the DC-7C." (f. 14422) When built, however, the Model 1649A did not live up to Lockheed's representations; it was superior to the DC-7C in terms of payload and range but did not meet Lockheed's claims in the contract negotiations with respect to speed and economy. (See A837) At one point Rummel informed Hughes that the plane had numbers of deficiencies, and Hughes asked that TWA do nothing which would in any way undermine the right of TWA to cancel the contract (A854). A task force was appointed by Carter Burgess, TWA's president, early in March, 1957 to "determine whether we [TWA] want the 1649s despite known problems relating to performance." (See A861). However, despite the deficiencies, the task force concluded that TWA should accept delivery of the aircraft notwithstanding their probable performance as they would supply needed capacity to TWA and no practical alternative was apparent (A863-64; see also A418). The Lockheed equipment was acquired pursuant to CAB approval (A185).

Annex A

(5) TWA would convey that Toolco's conduct during the jet era* was anticompetitive in that it was directed primarily in alternatively (1) counseling "boycott" as to some aircraft manufacturers, (2) dealing with others while at the same time refusing to deal with them, (3) appearing to consort with certain manufacturers while at the same time enjoying inactive competition with them and others and (4) thereby and otherwise frustrating at every turn the airline in which it held more than a 70% equity interest in order to captivate an allegedly captive market. (TWA Br. pp. 15-18, 20-29.) Again this is refuted by truths which have been enunciated by the corporate plaintiff and remain immutable regardless of the procedural posture of the case.

(a) By the end of 1954 aircraft engine technology advanced to the stage that it was thought feasible to develop a pure jet aircraft suitable for use by TWA on its domestic and international routes (A736). Prior thereto TWA had given active consideration both to limited range jets such as the DeHavilland Comet and then to a variety of aircraft being developed by Boeing, Convair and many other manufacturers (A586-88, A624-36, A693-712). In negotiations with Convair, TWA and Toolco sought to develop a jet (known as the Model 18) which could be used in both domestic and international service (A737-38). However, about the middle of 1955 Convair concluded that there was insufficient difference between the

* It should be noted that in listing the "*acts alleged to have been committed by the defendants prior to December 1960 pursuant to this conspiracy*" (TWA's Brief, pp. 16-18) all of the acts so identified, apart from Toolco's acquisition of its stock interest in TWA, pertain to the jet era.

Model 18 and airplanes to be built by Boeing and Douglas* to justify the risk (A739-40). Other possibilities were discussed with Convair, including a double-deck airplane, but the project was turned down by that company's board of directors (A741). Prior to the conclusion of negotiations on the Model 18 it became apparent that serious consideration would have to be given to available designs to place TWA in the jet market until a better plane could be produced, and upon the urging of Rummel negotiations were undertaken with Boeing (A742). However, TWA did not have the requisite financial resources to place orders for jet equipment and in December 1955 called upon Toolco to assume the necessary burden.** Accordingly, beginning in 1956 Toolco placed orders with aircraft manufacturers for jet equipment assignable to TWA.

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* Neither Boeing nor Douglas was offering an international jet when development of the Model 18 commenced; thereafter both manufacturers announced such a long-range version (A738, A739).

** TWA's chief financial officer wrote:

> "To your final question, the ability to finance additional equipment, we know that the manufacturer would require a down payment in the order of 25% and progress payments totaling at least another 25% during the succeeding 18 months from the signing of the contract.
>
> "However modest TWA's views might be, the figures indicate it could not, even with Tool Company assistance to the extent indicated in preceding paragraphs, generate any excess cash until 1959 if we assume payment of the Tool Company note during 1958 (which is optimistic). *Without laboring the point, I can only say, if TWA is to have additional aircraft requiring near-term cash, the Tool Company must accept the burden for a period extending at least beyond 1958.*" (R1363; emphasis added)

Compare TWA Br. pp. 22-23.

(b) Notwithstanding that Toolco was giving some consideration toward a more active role in the development of advanced design jet equipment,* Toolco placed an initial order for eight Boeing 707-131 (domestic range) jets; this aircraft was then viewed as a "stopgap" (A755-56). Thereafter, as it became apparent that newer, superior equipment would not be produced as had been hoped for, and upon delivery positions favorable to TWA becoming available, Toolco (with the participation of TWA personnel and legal counsel) ultimately increased its order to fifteen Boeing 707-131s and also in March 1956 ordered eighteen Boeing 707-331 (international range) jet aircraft (A756-59). In September 1956, Toolco committed to the purchase of thirty Convair Model 880 aircraft. TWA representatives participated in the

* It should suffice to point out that Toolco could not avoid CAB scrutiny of any such "plans" in a Section 408 context (see Toolco Br. pp. 27-28). In addition it should be noted that:

(a) The reference to a joint venture with AVRO (TWA Br. p. 25) is not even supported by the record references, which consist of the 1956 TWA motion to the CAB and a blind reference to a number of meetings from time to time during 1954-56 during which *AVRO* produced plans and information for review looking toward the development of a transport airplane (T137-38). This comports with the balance of Rummel's testimony concerning various degrees of negotiation with practically every manufacturer and potential manufacturer of aircraft in the free world concerning the development of equipment suitable for TWA's needs (see pp. 6a-12a, *supra*);

(b) The comments referring to Sud show that the objective was to secure better delivery positions for TWA (see T140-41; f. 13143-44);

(c) If anything, these "attempts" at joint ventures with foreign manufacturers would have had the obvious result of injecting a new element of competition among the then present manufacturers of commercial transport equipment.

negotiations with Convair, and the order for the 880s was not placed until after TWA management concluded that TWA wanted such aircraft (which were smaller and had shorter range characteristics than the Boeing jets and those which were being offered by Douglas). The number of aircraft ordered by Toolco was arrived at in light of the demands of Convair and the then estimated requirements of TWA. (See A502-04, A727-30, A746-51, A766-74.)

(6) Notwithstanding that the foregoing makes clear that the conduct of Toolco and Hughes did not inhibit access to TWA by aircraft manufacturers but actually fostered it and stimulated competition, TWA seeks to avoid the obvious by claiming "boycott" and referring to several isolated instances in which Rummel was directed not to negotiate with a particular manufacturer (TWA Br. pp. 20-21). Again TWA distorts the record. In its proper context, the testimony of Rummel shows that there was never any continuing injunction as to any manufacturer, that all of the manufacturers had ready access to TWA through the years, and that the specific directives referred to by TWA were for proper purposes and were so understood by Rummel.

(a) *Boeing.* Rummel testified that in 1953 or 1954 Hughes told him not to do any promotional work with Boeing (T116; T134). The reason for this was that Hughes feared that TWA might help Boeing to develop an airplane which could be utilized by TWA's

competitors, a fear that was shared by TWA.* Such advantage to TWA's competitors had occurred on prior occasions as, for example, when TWA and Hughes spearheaded certain design innovations which were incorporated in a DC-6B which TWA never purchased but which enabled TWA's competitors at an earlier date to have available to them an airplane competitive with that which TWA operated (T135; see p. 9a, *supra*).

(b) *Douglas.* Rummel also, testified that he was instructed not to communicate with Douglas with respect to jet aircraft (T-135). He stated as the reason for such instructions not that Hughes did not want TWA to enter into any kind of an agreement for the purchase of Douglas aircraft, but rather that Hughes wanted Douglas to approach him initially (T-136). Rummel testified that the people he knew at Douglas gave him the impression that *Douglas did not want to deal with Hughes* because they felt that (a) a deal with Hughes could not be concluded and (b) that TWA would only enter into negotiations with them in the hope that they would learn how far Douglas had progressed in developing commercial jets and subsequently utilize this information in a jet

* The Witness: "We had had a number of cases previous to that time wherein TWA's negotiation efforts had produced airplane improvements which TWA did not finally avail itself of, but the competition did." The Special Master: "You really helped your competitor, then, in those efforts?" The Witness: "Well, this, I think, was a general thing that he [Hughes] was trying to avoid. I don't recall whether or not this specific thing was stated in the conversation or referred to, but I understood his feeling on this, *in fact I shared it to a great extent.* . . ." (T-135; emphasis added)

which would be purchased from a competing manufacturer (T-136-37). The feeling of Douglas that it could not do business with Hughes may well have arisen from the fact that in two instances Hughes had entered into negotiations with Douglas for aircraft but TWA had determined to purchase Lockheed aircraft instead (A477-82, A486-502, A552-54, A800-07; see f. 12364-66, f. 22621; see pp. 8a-9a, *supra*).

(c) *Lockheed.* Rummel also testified that on one occasion he was told "not to work with" Lockheed (T-133, T-145). According to Rummel, the underlying reason for this was that Hughes, at the time he placed this restriction on Rummel, was already negotiating with Lockheed for aircraft for TWA and he thought it best to avoid negotiations with Lockheed by any other party since it might only result in confusion (T-133, T-146). Moreover, Rummel testified that prior to a decision to proceed with the Convair 880 program, consideration was given to a proposal that Lockheed Electras be purchased instead. Hughes had been interested in the possibilities of Electras (A723-26, A851-52), and in June of 1956 arranged for a Lockheed representative to meet with Rummel, Leslie, and Harry West (counsel for TWA) in Kansas City, to discuss a program of Boeing jets and Electras (f. 17628-39). Subsequently, however, TWA management determined not to acquire the Electra (A533, A853).

(d) *Convair.* Rummel said that the apparent reason for his instruction not to talk with Convair was that Hughes preferred that he or a Toolco representative negotiate with respect to 990 aircraft (T-132-33).

At the same time TWA representatives were actively meeting with Convair in regard to the 880s (T-116). Rummel pointed to the work with Convair and the development of the Model 880 as one of the "competitive situations of advantage" which resulted from the efforts of Toolco and TWA (see A582, A586-88, A590). The record is clear that the Convair and Boeing would not have been in competition with respect to jet aircraft without such efforts.

(7) In conclusion it may be fairly stated that the testimony of TWA below establishes the following:

(a) During the post-war period there have been five major manufacturers of commercial aircraft in the United States, namely, Lockheed, Douglas, Boeing, Martin and Convair (see A592-96). During the same period TWA acquired aircraft manufactured by Lockheed, Boeing, Martin and Convair (see A179-86, A196-99(A211-27, A800-02, A817-23). Although no Douglas equipment was acquired by TWA* subsequent to the war (other than surplus equipment acquired from the government), in at least two instances Hughes favored the acquisition by TWA of equipment from Doug-

* It is interesting to note that the Initial Decision of the Examiner in the *Toolco-Northeast Control Case* contained the finding: "Toolco owns four Convair 880's available for air transport purposes, it has contractual rights to five executive-type Lockheed Jet Star aircraft, has a subsidiary which manufactures two place helicopters, uses commercial aircraft in its business operations including a [*Douglas*] *DC-6A*, Convair 440, B-23, [*Douglas*] *DC-3*, and several Cessnas . . . . " (R. 814; emphasis added)

las in preference to Lockheed equipment but in each instance the TWA management determined to purchase later models of the Lockheed equipment which it was then using. Indeed, Rummel testified that the efforts of TWA and Toolco were largely responsible for the development of the Douglas DC-6B. He pointed to the development of this aircraft as one example of activities of TWA and Toolco to create competition among suppliers of aircraft (see p. 9a, *supra*). Others included the "Martin-Convair situation" (see p. 8a, *supra*), and the competitive situation which developed between Boeing and Convair with respect to jet aircraft as a result of the activities of TWA and Toolco in "trying . . . to get an airplane that was better for TWA than the others appeared at that time to be willing to produce." (A590);

(b) In efforts to acquire the equipment best suited to TWA's needs, TWA under Toolco control, considered the merits of offerings of aircraft by practically every supplier thereof in the free world (see pp. 6a-12a, *supra*); and

(c) Toolco never attempted, to the knowledge of Leslie, TWA's chief financial officer for some seventeen years, to force TWA to boycott any supplier of aircraft or to force TWA to acquire aircraft from one aircraft supplier rather than another (A570-73, A578; see f. 12364-66); see also A477).

ANNEX B

The Acquisition of Aircraft and Financing by TWA and Other Transactions before the CAB Involving the Toolco-TWA Relationship

The history of the Toolco-TWA relationship can be obtained from the files of the Board. It is demonstrably a history of Toolco's financial assistance to TWA in acquiring aircraft during the period of TWA's major expansion. In the period 1939 through 1960 TWA made applications to the Board for, and was granted, increases in its certificated route mileage from less than 6000 to more than 60,000, and was thus able to increase its annual revenue passenger miles from 100,195,000 to 5,490,000,000. In the same period TWA's net worth increased from $5,300,000 to $126,000,000 and TWA also acquired in the aggregate of over 300 aircraft of all types. Of these aircraft, the vast majority were acquired directly from the manufacturers in transactions reported to the Board, and the balance were acquired from the manufacturers through Toolco in transactions specifically approved by the Board. Many of the purchases made by TWA directly from the manufacturers required financial assistance from Toolco under arrangements also approved by the CAB. From the applications of TWA, the exhibits to its applications, the orders of the Board and the related public documents, including the Registration Statements of TWA, each of the equipment acquisitions and financial transactions which involved Toolco can be fully reviewed. There follows a summary narrative account of this history.*

* All of the documents referred to and which concern Toolco may be found in the records of the Civil Aeronautics Board or the Securities and Exchange Commission.

A. 1939-1943

On November 19, 1943, Toolco applied to the Board for approval of or disclaimer of jurisdiction over its acquisition of control of TWA (R. 183-85). On October 17, 1944 the Board approved Toolco's acquisition of control over TWA but limited commercial transactions between the parties absent Board approval. *Transcontinental & Western Air, Inc., Control by Hughes Tool Co.*, 6 C.A.B. 153 (1944).* As was found by the Board in the *1944 Control Case*, Hughes first became interested in TWA in 1939 as the result of the solicitation of Jack Frye, who was then president of TWA and a personal friend of Hughes, and by the end of 1942 Toolco had acquired 45.6% of the total outstanding stock of TWA (6 C.A.B. at 154).

In the period between Toolco's initial acquisition of stock and its application for approval of control, TWA engaged in three major financings. The first of these was in 1939 when TWA borrowed $300,000 from the Commercial National Bank & Trust Company in order to help finance the purchase of five Boeing Model S-307 aircraft (R. 1336); the second was in 1940 when it sold to Toolco 119,154 shares of common stock, par value $5.00, at $14.00 per share, the proceeds of which were applied to the purchase of the same Boeings (A948-49; R. 671); and the third was in 1940 when TWA entered into a $2,250,000 re-

* For a detailed description of the control proceeding, see Toolco Main Brief, pp. 12, *et seq.*

volving credit agreement with the Commercial National Bank and six other banks (R. 1336).*

B. 1945

In 1945 TWA contracted with Lockheed to purchase eighteen Model 049 Constellations and eighteen Model 649 Constellations (f. 20685). In order to finance this and other post-war acquisitions of equipment, TWA sold to Equitable, on November 30, 1945, $30 million principal amount of sinking fund debentures. *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Co.*, 9 C.A.B. 381, 383 (1948). The provisions of the indenture pursuant to which the debentures were issued required, as was recognized by the Board, that Equitable consent to all future equipment acquisitions and financings.**

In addition to the Equitable financing, TWA delivered to nine banks promissory notes in the aggregate principal amount of $1,700,000. The purpose of this financing was to enable TWA to repurchase and rebuild five Boeing 307s it had sold to the government (R. 1336; f. 20684-85, f. 20695-96).***

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*During the war years TWA purchased or leased a number of Douglas DC-3 and C-54 aircraft from United States government. TWA also purchased three C-54 aircraft from T.A.C.A. Airways, S.A. (f. 20685).

** In 1950 the Board found that "it is impossible now for TWA to acquire aircraft without obtaining prior consent or waivers under various financial agreements it has entered into in the past, including the trust indenture covering the debentures held by Equitable." *Trans World Airlines, Inc., Further Control by Hughes Tool Co.*, 12 C.A.B. 192, 208 (1950).

***On May 10, 1945, the Board approved, pursuant to Section 409 of the Act, the holding by Charles W. Perelle of interlocking directorships in Tooleo and TWA. (Order No. 3662 (May 10, 1945)).

C. 1946

On May 10th, TWA sold to Equitable an additional $10 million principal amount of sinking fund debentures. (12 C.A.B. at 204; R. 1336; f. 20688). The purpose of this financing was to enable TWA to purchase additional aircraft. During the same period TWA contracted with Lockheed to acquire thirteen additional Model 049 aircraft. (f. 20685) However, in the latter part of that year TWA, after taking delivery of the eighteen 049s it had ordered in 1945 and five of the thirteen it had ordered in 1946, cancelled its commitment for the remaining aircraft. This decision was arrived at on account of the financial crisis which beset TWA and which came about as the result of (i) the grounding during July and August of all Constellations by the Administrator of Civil Aeronautics, and (ii) a lengthy pilots' strike in October and November (f. 20685; see also Handbook of Airline Statistics, pp. 511, 514 (CAB 1963)).*

D. 1947

On January 9th, the TWA Board of Directors accepted a proposal whereby Toolco would lend $10 million on the condition that the Board of Directors be reconstituted so that a majority of the directors

* During this year TWA, in connection with the repurchase of aircraft from the government, also issued Equipment Mortgage Notes in an amount in excess of $1 million (R. 1336). TWA also sold at cost to Toolco two Lockheed aircraft which it had repurchased from the government and on which Toolco had an option (f. 20686). This transaction was approved by the Board in Order No. 4437 (A174-75).

would be nominees of Toolco (9 C.A.B. at 381; f. 20589-91, f. 20687).* Pursuant to the agreement, Toolco acquired $10 million principal amount of TWA's 2¾% subordinated convertible notes.** (A242; f. 20687).

Upon the execution of the agreement, the TWA Board was reconstituted (A244). Toolco and TWA requested the Board to approve the loan and any other provision of the agreement under the terms of the 1944 control order, as amended, if such approval were deemed necessary. (R. 714) Although the Board advised TWA and Toolco that none of the provisions of the agreement "constituted the kind of commercial transaction intended to be governed by the conditions imposed" (R. 714) by the 1944 control order, it instituted a proceeding to determine whether there may have been such a change in the character or extent of the control by Toolco over TWA so as to constitute a further acquisition of control requiring ap-

* Due to the heavy losses which TWA sustained in 1946, by the end of the year it was in a position where it could not meet its next payroll. (12 C.A.B. at 205-06) Toolco advised TWA that it "... was willing to be of further financial assistance but was unwilling to advance additional money to save the carrier without assurance that the management of the carrier would be replaced and the carrier reorganized and run in agreement with the wishes of the principal stockholder and/or its representative." (12 C.A.B. at 206)

** The notes were convertible into common stock. The conversion price was the par value thereof or the average of the closing price on the New York Stock Exchange for the ten days immediately preceding the notice of conversion, whichever was greater. Toolco's conversion privilege could be exercised at any time until June 2, 1956, the date on which the notes matured. In addition, TWA had the power to require Toolco to convert on January 1, 1950, at a price calculated by the same method. (9 C.A.B. at 384; f. 20589-90, f. 20687).

proval under Section 408 of the Act (Order No. E-289; R. 740-42).* This investgation resulted in the *Further Control Case* and was terminated in 1950 after the Board approved the further acquisition of control as being consistent with the public interest standards of the Act. (12 C.A.B. 192; see Toolco Main Brief, pp. 15-20).

Under the provisions of the debenture Equitable's consent to the $10 million loan by Toolco was mandatory (A243). In order to obtain this consent, on January 31, 1947 Toolco, TWA and Equitable entered into a three-party agreement (R. 1277-85) which provided, among other things, that if Toolco did not lend the entire $10 million to TWA or if TWA defaulted at any time in the payment of principal or interest on the debentures which had previously been sold to Equitable, then Toolco would place its stock in an Equitable-controlled voting trust (R. 1280, R. 1307-23). TWA also agreed to an extension of the date of maturity of the 1946 debentures from December 1, 1951 to December 1, 1955, and a retroactive increase in the rate of interest to 3% from 2¼%, and an increase in the redemption price thereof (R. 1286-1300; f. 20688).

In March, TWA purchased four Model 049 Constellations from Lockheed. These aircraft were financed principally through Equipment Mortgage

* On June 18, 1947, the Board ordered a limited hearing in this matter (Order No. E-657; R. 747-48); on July 14 a pre-hearing conference was held (R. 724-30); in September hearings were held; and on January 30, 1948 the Examiner filed his report (A228).

Notes in the amount of $2,815,480 running to Lockheed (R. 1336; f. 20685).

In December Toolco waived its right to require payment of the subordinated convertible notes or interest thereon in any form other than TWA stock (9 C.A.B. at 385; f. 20687). The Board noted that this agreement considerably improved the financial structure of the airline (12 C.A.B. at 210) and specifically recognized that the TWA-Toolco agreement required TWA to "come to Toolco to obtain consent of the latter before purchasing additional equipment. Certainly this transaction also represents an element of new and increased control arising out of the letter agreement." (9 C.A.B. at 391).*

E. 1948

In March TWA concluded a credit agreement with Lockheed and certain banks whereby more than $18 million was made available to TWA. The purpose of this agreement was to finance the purchase of 12 Model 749 Constellations and spares from Lockheed which TWA had ordered in November, 1947 (f. 20638-41), and to refinance the purchase of nine 049 aircraft theretofore acquired (f. 20685, f. 20698). Toolco consented to this transaction under terms beneficial to TWA and in addition consented to a subordination of the convertible notes which it held (9 C.A.B. at 385). At the same time Equitable and

* On April 4, 1947, the Board approved, pursuant to Section 409, the interlock between Toolco and TWA held by Noah Dietrich. (Order No. E-429).

the parties to the credit agreement entered into a Multi-Party Agreement whereby Equitable consented to the aircraft acquisition and financing arrangements on the condition, among other things, that it be given the right to acquire all of the notes issued pursuant to the credit agreement (f. 20688-89).

On June 15th, TWA's Board authorized an offer to Toolco to convert the notes and the interest accrued thereon into TWA's common stock at $10 per share. The transaction was not consummated until after (1) the consent of Equitable was obtained (f. 20689) and (2) the agreement was approved by TWA's stockholders, including the holders of a majority of common stock not owned by Toolco (12 C.A.B. at 206). Upon surrender of the notes 1,034,423 shares of TWA's common stock were issued to Toolco.* (f. 20687).

In October 1948, Toolco agreed to sell to TWA, subject to CAB approval, two Model 049 Constellations at Toolco's cost. TWA's motion for approval of this transaction recited, *inter alia*, that:

> "... said airplanes are required by TWA for use in its domestic operations; the manufacture of airplanes of this model has been discontinued; ... and the price to be paid by TWA to Hughes Tool Company for said airplanes is substantially below the price paid by TWA for airplanes of

* Efforts by a minority stockholder of TWA to enjoin the conversion of the notes were denied by a federal district court, *Snyder v. Transcontinental & Western Air, Inc.*, 79 F.Supp. 339 D. Del. 1948.

the same model purchased by it from Lockheed Aircraft Corporation in May of 1947."* (R. 197)

By order dated January 27, 1949 (No. E-2404; A177-78), the Board amended its 1944 control order so as to permit the consummation of the above transaction. The conditional sales contract was signed on February 1, 1949 (12 C.A.B. at 208). Prior thereto the aircraft were used by TWA without charge (R. 197; f. 20686).**

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* Submitted in support of the motion were affidavits of the Chairman of the Board of Directors of TWA and the Treasurer of Toolco, as well as other relevant documents (R. 195-212). In addition, the Chief, Carrier Relations Section of the Board, requested Toolco to submit further information relating to the transaction. This request affords a graphic measure of the comprehensive nature of the continuing control over Toolco-TWA affairs which the Board undertook to exercise. It stated that in light of Toolco's request to sell aircraft to TWA:

> "... it is not felt that action can be taken on this motion without first obtaining additional information, such as the full history of the airplanes, including copies of the original bills of sale to Hughes Tool Company, a breakdown of the cost elements of each airplane, including the cost of each item of conversion, the amount of depreciation accrued on each airplane, an appraisal of the planes at cost or market value, whichever is lower, by an impartial third party, a statement of the use made of the planes from the date they were purchased to the present date, including total number of flying hours, the total number of hours of use of each engine. It is assumed, of course, that Transcontinental & Western Air, Inc., has secured all necessary consents and approvals to the proposed purchase required under or by reason of any prior commitments made by the carrier." (R. 615)

** It should also be noted that both of these aircraft were converted, at Toolco's expense, to conform with the other Model 049 Constellations already owned by TWA. (f. 20686).

F. 1949

During February TWA offered 404,112 shares of its common stock to its stockholders at $10 per share. Toolco agreed to subscribe to its *pro rata* portion, namely 297,304 shares. The Board found that "Toolco's advanced commitment to take up its pro rata portion of the carrier's offering . . . made it possible for the carrier to undertake that financing at that time." (12 C.A.B. at 210).

Early in 1949 TWA commenced negotiations with both Lockheed and Douglas for the acquisition of additional four-engine equipment. The number of aircraft to be acquired by TWA was, however, dependent upon its ability to secure the necessary financing. Discussions were commenced with the Mellon Bank, which was then TWA's lead bank, and Equitable due to the position it held over the affairs of TWA. (f. 22078). The banks insisted as a condition to their participation in the financing that they be given a right of first refusal with respect to any additional debt financing proposal by TWA (f. 22056) and together with Lockheed and Equitable further insisted, among other things, that Toolco guarantee that TWA's net worth be at least $20 million as of December 31, 1949, an increase of $10 million. (12 C.A.B. at 210; f. 22078-80). Toolco agreed to this demand and a bank credit was thereafter arranged for the acquisition of twenty Model 749A aircraft from Lockheed, the indebtedness to be secured by a chattel mortgage (f. 22015-80).

G. 1950-1954

On February 28, 1950, TWA requested Board approval of Toolco's proposal to sell at cost, by nonrecourse conditional sales contracts, six Lockheed 049s to TWA.* (R. 213-40). In its motion TWA noted that four of these aircraft were being acquired by Toolco from Air France and the remaining two from Lockheed** and that:

> *"The contracts for the purchase of these airplanes were entered into directly by Hughes Tool Company to assist TWA in acquiring such airplanes. It is impossible for TWA to acquire aircraft without obtaining prior consents or waivers under various financial agreements it has entered into in the past. The Indenture of December 1, 1945, as amended, between TWA and The Commercial National Bank and Trust Company of New York, as Trustee, covering the Debentures held by The Equitable Life Assurance Society of the United States, prohibits, under present conditions, the acquisition by TWA of any new aircraft without the consent of the holders of the Debentures. The Chattel Mortgage of August 4, 1949 from TWA to Mellon National Bank and Trust Company, as Trustee, prohibits borrowings, mortgaging of aircraft, or acquisition*

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* Among other things furnished by TWA in support of its motion was the conditional sales agreement which set out in detail the financing arrangements (R. 217-24).

** Toolco's purchase contracts with Lockheed and Air France also accompanied the application (R. 225-40).

of aircraft by conditional sales agreement except after thirty days' written notice by TWA to, and negotiations with, the Lending Banks under such mortgage. Because it would be necessary for TWA to obtain additional financing to acquire these six airplanes, TWA could not have entered into arrangements for their purchase without complying with or obtaining consents or waivers under both of these agreements. *By contracting to purchase these airplanes immediately Hughes Tool Company insured that they would be available to TWA upon the completion of the necessary clearances under these agreements.*" (Emphasis added) (R. 215).

In addition, TWA stated that "Hughes Tool Company is providing TWA with financial arrangements on better terms than would otherwise be available. . . ." (R. 216). It compared the 2½% interest rate and a 16% down payment with a 3% interest rate and a 35% down payment in the then recently executed arrangement made directly with Lockheed and others for the purchase of twenty 749A Lockheed Constellations. (R. 216). On May 12, 1950, the Board approved the proposed transaction.* (Order No. E-4160; A179-80)

At approximately the same time, TWA contracted with Martin for the purchase of thirty Martin 404 air-

* Despite the fact that the sale of these aircraft was to be in the form of a non-recourse conditional sales contract, TWA had to seek permission from Equitable and the banks who were parties to the 1949 credit agreements, as well as Lockheed, in order to enter into this transaction. (f. 22095-22100)

craft and for the lease of twelve Martin 202A aircraft.* (12 C.A.B. at 208, n. 35). Financing for the purchase of these aircraft was arranged with the same banking institutions which had financed the Lockheed purchases and followed the same basic pattern. (f. 22640-1).

In order to obtain Equitable's consent to the acquisition of the Martin aircraft and the financing thereof, Equitable demanded that TWA agree to sell, prior to December 31, 1951, a sufficient quantity of stock so as to realize at least $5 million and that Toolco agree to guarantee the performance of TWA's agreement or to lend TWA that amount on a subordinated basis. (R. 245-46, R. 270-72). Toolco and TWA formally agreed to this demand on April 5, 1950. (R. 245; f. 20766).

After the agreement with Martin was executed, TWA concluded that it still needed more aircraft. On July 27, 1950, TWA exercised option rights to acquire six additional Model 749As from Lockheed. Of these aircraft, one was ordered by TWA at the request and for the account of Toolco and was subsequently sold to Toolco. (R. 245). Of the remaining 749A aircraft the final installment of the purchase price of four of these aircraft was financed by Toolco under a conditional sales agreement because of various demands of Equitable and others. (R. 244).

In August 1950, eleven additional Martin 404 aircraft were ordered by TWA. (R. 243). One of these

* In 1952 TWA purchased from Martin the leased aircraft. (f. 20780).

aircraft was for the use of Toolco and was sold to it. The remaining Martins were financed by the TWA banks under an arrangement similar to that under which the original thirty Martin 404s were financed. (f. 20768). Toolco took no part in this financing.

On October 6, 1950, the Board entered its order in the *Further Control Case* approving as in the public interest Toolco's acquisition of full and complete legal control of TWA.* (12 C.A.B. at 192).

On December 5, 1950, TWA entered into a contract with Lockheed for the acquisition of ten Model 1049A aircraft. Thereafter TWA entered into negotiations for the financing thereof. Said financing was arranged with the TWA traditional banking group and on January 15, 1951 a credit agreement was concluded. (f. 22641)

As a condition to its consent to the creation of this indebtedness Equitable demanded that Toolco buy sufficient shares of TWA's common stock (to the extent sufficient shares were not otherwise sold) to provide TWA with net proceeds from the sale of the common stock to realize at least $5 million. (R. 246; f. 20756, f. 20766). On January 16, 1951, Toolco and TWA consented to this demand. (R. 272-74).

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* In 1950 the Board also approved, pursuant to Section 409 of the Act, the holding of interlocking relationships in Toolco and TWA by Thomas A. Slack, Fred W. Ayers and Harry Rogers. (Order No. E-4223 (May 24, 1950)). Similar approval was also obtained with respect to Albert V. Leslie on January 4, 1951 (Order No. E-4999).

In March 1951, TWA moved the Board to enter an order approving (1) the proposed sale by TWA to Toolco of one Martin 404 aircraft (see p. 13b, *supra*); (2) the proposed financing by TWA through Toolco of the final installment of the purchase price of the four Lockheed Constellation 749A aircraft by means of a conditional sales contract (see p. 13b, *supra*); (3) the proposed sale by TWA to Toolco of one Lockheed Constellation 749A aircraft (see p. 13b, *supra*); and (4) the agreements between TWA, Toolco and Equitable dated April 5, 1950 and January 16, 1951 (see pp. 13b, 14b, *supra*). In that motion TWA submitted all of the agreements relevant to the various transactions. (R. 248-74). Therein TWA noted, among other things, that:

> (1) "The purchase by [Toolco] of a Martin Model 404 Aircraft is of potential benefit to TWA in that . . . the purchase price of each airplane purchased by TWA is reduced by $12,500 if the . . . Martin Company manufactures more than 100 of such airplanes in continuous production." (R. 243);
>
> (2) "[Toolco] is taking title to these four [749A] airplanes and selling them to TWA on a conditional sale basis solely for the purpose of enabling TWA to finance the acquisition of such airplanes. . . ." (R. 244);
>
> (3) "TWA is to pay [Toolco] for these airplanes only the amount which [Toolco] has paid to Lockheed, with interest on the unpaid balance as provided in the conditional sale contract. [Toolco] is providing TWA with financing for the acquisi-

tion of these four airplanes on better terms than would otherwise be available to TWA." (R. 244);

(4) "These four airplanes are required by TWA for use in its domestic and international operations. The addition of these planes to TWA's present fleet will permit increased Constellation service and increased revenue mileage and will thus improve TWA's service to the public." (R. 244);

(5) ". . . The purchase by [Toolco] of a Lockheed Constellation Model 749A Airplane [from TWA] is of substantial benefit to TWA in that under [TWA's contract with Lockheed] the purchase price of each airplane purchased by TWA is reduced as the number of planes purchased thereunder is increased through the exercise by TWA of option rights." (R. 245);

(6) "The execution of [the agreements with Equitable] were essential parts of the transactions pursuant to which TWA arranged to purchase and finance new fleets of Martin and Constellation aircraft. The execution of the 1950 Agreement was made a condition precedent by Equitable to its consent to the purchase by TWA of 30 Martin Model 404 aircraft. . . . The execution of the 1951 Agreement was made a condition precedent by Equitable to its consent to the purchase by TWA of 10 Lockheed Model 1049 Constellation Aircraft. . . ." (R. 246); and

(7) "The 1950 Agreement and the 1951 Agreement were entered into by [Toolco] to enable

> TWA to purchase aircraft required by TWA and essential to its future operations. Their purpose is to aid TWA by providing it with additional equity capital, whether by sale of stock to others, by sale of all such stock to [Toolco], by the purchase by [Toolco] of its pro rata share of stock offered to others or by means of a subordinated loan. The execution and performance of both these agreements will be of substantial benefit to TWA." (R. 247)

On April 15, 1951, the Board approved Toolco's role in the above transactions. (Order No. E-5324; A180-182).

H. - 1952-1954

In February 1962, pursuant to the 1950 agreement with Equitable (p. 13b, *supra*), TWA made an offering of 242,987 shares of its $5 par value stock. Toolco purchased 204,110 shares at the offering price of $21.25 per share. (f. 22628). On November 20, 1952, and as a result of the 1951 agreement (see p. 14b, *supra*), TWA offered additional shares of common stock at a subscription price of $16.00 per share. Toolco purchased 263,100 of the approximately 355,000 shares ultimately sold. (f. 20756).

In July 1953, TWA entered into letter agreements with Lockheed for the purchase of eight Model 1049G aircraft, with short-term option rights to purchase up to 12 additional airplanes of the same model. In September of that year TWA exercised its option to

purchase the additional aircraft subject to securing the necessary financing. Such financing was thereafter obtained from TWA's traditional banking group. (1954 Annual Report of TWA, p. 4; f. 22606-20, f. 22773-74).

In February 1954, TWA learned that Delta Airlines had available for sale three Constellation aircraft which were built generally to TWA's specifications. In order to obtain the necessary financing as expeditiously as possible, TWA arranged with Toolco to acquire the aircraft by means of a non-recourse conditional sales contract. On March 25th TWA requested Board approval of the TWA-Toolco transactions stating that the sales were to be at cost and the interest rate and TWA's initial payment were to be substantially less than comparable market rates. (R. 275-91). The motion papers included the conditional sales agreement wherein financing and delivery prices were set out as well as Toolco's letter agreement with Delta which also contained the necessary financial details. On April 1, 1954 the Board approved the transactions between Delta, Toolco and TWA. (Order No. E-8214; A183).

In December, 1954 TWA refunded the unpaid portion of the Equitable debentures as well as its existing bank debt. This refinancing took the form of a $10 million revolving credit agreement with a group of banks headed by Irving Trust Company together with an agreement with Equitable whereby a maximum of $40 million principal amount of 3¾% Equipment Mortgage Bonds due June 30, 1969, was made

available to TWA. (1954 Annual Report of TWA, p. 4; S.E.C. Form 8K filed January 11, 1955.

I. 1955-1956

As was stated in a note to the TWA financial statements contained in the airline's 1955 Annual Report:

> "In November, 1955, the Company was granted options by Hughes Tool Company to acquire all of its rights under two contracts covering the purchase of aircraft at an aggregate price of approximately $74,000,000 to be delivered during 1956 and 1957. The options are exercisable by TWA during 1956, subject to CAB approval. . . ." (p. 18).

Thereupon, on May 17, 1956, the CAB approved the motion of TWA that it be permitted to exercise options for the purchase from Toolco, pursuant to conditional sales contracts, a substantial fleet of new piston equipment—eight Model 1049G's and twenty-five Model 1649A's—then being manufactured by Lockheed. In its order granting modification of the basic order in the 1944 *Control Case*, the Board stated:

> "We have considered all of the circumstances surrounding the proposal and find it in the public interest to relax the restrictions in the aforementioned Order No. 3210. The Board has recently awarded TWA several new route segments and it appears that additional aircraft are required to implement such services. Furthermore, it appears that the new equipment is being made

available to TWA at cost with the advantage of earlier delivery than would be possible if purchases of like equipment had to be made in the open market. . . ." (Order No. E-10300; A185; see also R. 292-332).

It was recognized by all concerned that the conditional sales agreements represented temporary financing and that the obligations would be refinanced when a suitable plan could be developed. As in the past, and pursuant to requirements set by the lending institutions whose consent was necessary, the conditional sales contracts were to be without recourse to the general credit of TWA.

Commencing in the early part of 1956 and in order to assist TWA in the procurement of the most suitable fleet of jet aircraft, Toolco placed orders for sixty-three jet aircraft to be manufactured by Boeing and Convair (and for spare engines and equipment manufactured by others), under contracts assignable to TWA. (1955 Annual Report of TWA, p. 4; 1956 Annual Report, p. 3; *cf.* R. 396, 417-20, 425, 520). Toolco's total commitments in connection with this jet equipment program exceeded $300 million (AA 245). The arrangement between TWA and Toolco with respect to this equipment is described in a 1957 TWA Registration Statement as follows:

"Hughes has placed orders, under contracts assignable to TWA, for 15 Boeing 707-131 aircraft, 18 Boeing 707-331 aircraft, and 30 Convair 880 aircraft, for delivery beginning in 1959. These contracts are subject to modification as to number

and model of aircraft covered and as to specifications of the aircraft, including seating capacity. Hughes is not committed to sell any of these aircraft to TWA, nor is TWA committed to buy any of them from Hughes. Any such transaction between TWA and Hughes requires approval of the Civil Aeronautics Board." (f. 24427)

In addition to the orders it had placed, Toolco began to investigate the feasibility of manufacturing a superior type of jet aircraft suitable for use by TWA interchangeably on its domestic and international routes. On June 8, 1956, in response to a motion by TWA for approval of the acquisition of jet aircraft of advanced design which Toolco indicated willingness to develop and construct for delivery commencing in 1961 (R. 334-35), the CAB instituted an investigation "to determine (a) whether the proposal of Hughes Tool Company to manufacture and sell up to 25 jet-powered aircraft for TWA and other air lines will result in a transaction requiring further Board consideration, under section 408, of the control of TWA by Hughes Tool Company; (b) if so, whether the Board should approve or disapprove such transaction under section 408(b) of the Act" (Order No. E-10360; A187, A189).* In view of a number of developments soon thereafter, Toolco's entry into the field of commercial jet aircraft manufacture became unfeasible, and the investigation was ordered terminated in 1958 after TWA withdrew its motion (Order No. E-12604; A195).

* As to the scope of the proposed investigation, see Toolco Main Brief, pp. 27-28.

In the meantime, on September 28, 1956, the CAB instituted a separate Section 408 investigation on its own initiative into the acquisition by Hughes of a possible controlling stock interest in Atlas Corporation (Order No. E-10646). This proceeding was ultimately resolved when the Board approved a stipulation and settlement whereby Hughes submitted himself to the jurisdiction of the Board under Section 408 and offered to place his stock in an irrevocable voting trust. *Hughes-TWA-Atlas-Northeast Airlines, Possible Common Control Case,* 27 C.A.B. 155 (1958).*

In order that TWA might be assured of the funds it required to meet its current needs into 1958, Toolco (with the consent of Irving and Equitable) agreed to extend a $10 million credit on a basis subordinated to Equitable's position, without any commitment fee (as would have been required by the banks), and at an interest cost equivalent to the prevailing prime rate for commercial loans. On December 18, 1956, pursuant to a motion by TWA setting forth the relevant facts (R. 336-41), the CAB approved this TWA-Toolco transaction. (Order No. E-10871; A190).

During 1956 the CAB also approved, pursuant to Section 409, the holding by M. E. Montrose, C. H. Price and D. J. Martin of interlocking directorships

* The voting trust was executed pursuant to this order. See 31 C.A.B. 1003, at n. 4 (1960). The trust was extended from time to time during 1961 and the required divestiture upon its termination was ultimately deferred indefinitely due to the pendency of the *Toolco-Northeast Control Case*. See Order No. E-17782 (Nov. 30, 1961).

and offices "within the system" of affiliated and subsidiary companies composed of TWA and Toolco." (Order No. E-10024; Order No. E-10310).

J. 1957

The contemplated refinancing of existing and future conditional sales contracts with respect to the acquisition by TWA of the Lockheed 1049G's, 1649A's and related equipment (see pp. 19b-20b, *supra*) was consummated in mid-1957 with, *inter alia*, the sale by TWA of common stock to its stockholders, principally Toolco,* in excess of $43 million. Pursuant to the motion of TWA (R. 342-57), and upon the finding that "the proposed refinancing program, including the possible increased percentage of stock held by Toolco in TWA, raises no new questions under section 408" and that it "does not violate the original intent of the restriction imposed upon transactions between TWA and Toolco," the CAB approved the transaction on June 11, 1957 (Order No. E-11432; A192, A193). As the Board noted in its order, the application of TWA described the advantages of the proposed financing plan, including improvement of its debt-equity ratio and that it would be left in a more flexible position for future financing of jet equipment (A193; see R. 349-50).

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* Toolco acquired somewhat more than $35 million worth of the TWA stock, thus increasing its ownership interest from approximately 74% to the present 78.2%. In addition, pursuant to its commitment with respect to the establishment of a revolving credit (see J 349-52), Toolco loaned almost $6 million to TWA in December of 1957. (See R. 415-16).

By December, 1957 both TWA and Equitable recognized that in light of the downward trend in TWA's revenues TWA would have to obtain $12 million in additional cash by the end of that year. The necessary funds were then obtained for TWA from the banks (with the consent of Equitable) on an unsecured, 90 day basis (renewable for an additional 90 days), guaranteed by Toolco (R. 362-63). Toolco's guarantee received CAB approval (Order No. E-13334; A 196; see p. 25b, *infra*).

Also during December, 1957 Toolco purchased over $1 million of spare parts originally ordered by Linee Aeree Italian in connection with four Lockheed 1649A aircraft that airline had contracted to purchase from the manufacturer (the contract had been cancelled). TWA agreed to buy the remainder of such spare parts and on December 31, 1957 it contracted with Lockheed to acquire the four aircraft when they became available (R. 361; see also A518-19). Subsequently, pursuant to approval by the CAB, TWA acquired the additional spare parts at Toolco's cost; the CAB also approved Toolco's guarantee of conditional sales contracts whereby TWA was to acquire the four 1649A's from Lockheed. (A 196-99; see p. 25b, *infra;* see also R. 361-64).

K. 1958

In transactions—the final ones involving the acquisition of piston aircraft by TWA—approved by the CAB as in the public interest, Toolco enabled TWA (i) to sublease five Lockheed 1049H aircraft from

Toolco and (ii) to purchase an additional four such aircraft from Lockheed upon financing terms similar to the last four 1649A's (see p. 24b, *supra*), including Toolco's guarantee. (Order No. E-13334; A196; see also R. 359-67). In its order the CAB noted TWA's statement that the guarantees by Toolco of TWA's obligations (referring to the $12 million loan, see p. 24b, *supra*, and the conditional sales contracts with Lockheed on the 1649A's and 1049H's) "were of substantial advantage to the carrier, were purely for TWA's convenience and entailed no cost whatever to TWA." (A197).

TWA's 1957 Annual Report, issued during March 1958, contains the following significant remarks by its Senior Vice-President-Finance and Treasurer:

> "The general outlook for business is far less satisfactory than a year ago. However, there are several plus factors. The Company has integrated the 25 1649-A's into its fleet, its service standards are at a peak and the Civil Aeronautics Board has taken some cognizance of the industry's need for compensatory rates to match the continually increasing costs of doing business which we are hopeful is a precursor to a more realistic approach toward the industry's necessities.
>
> The rate increase effective February 10, 1958 on domestic passenger traffic is 4% plus $1 per ticket issued, palpably but a sop to the industry's needs if it is to attract the capital required for the jet age. During the course of the current year we will

address ourselves actively to this problem since delivery of the jet airplanes under order by the Hughes Tool Company under contracts assignable to TWA will commence during early 1959." (p.7)

TWA continued to operate at a loss despite the increased revenues generated from the introduction into service of the new Lockheed equipment.

On June 30, 1958, when the $12 million bank loan to TWA matured, TWA was without sufficient means to repay the loan. In view of the position taken by Equitable, whose consent to an extension of the loan was needed, and the lack of time to negotiate a suitable solution of the complex problems, Toolco itself repaid the loan (pursuant to its Board-approved guarantee) with funds it borrowed from the banks. (See R. 637).

L. 1959

The first Boeing 707-131 theretofore ordered by Toolco came available in January 1959, and was immediately turned over to TWA by Toolco on the basis of a day-to-day lease terminable by either party. The lease agreement (including the payment of rentals) was expressly conditioned upon approval by the CAB and Equitable (R. 375). TWA's motion to the CAB refers to Toolco's order of fifteen 707-131s and states further that: "Although TWA has entered into no specific commitment to acquire such aircraft it nevertheless contemplates that certain of these aircraft will be made available to it, on terms not yet determined,

for use in TWA's certificated operations." (R. 369). Noting that in the motion TWA also "states that the aircraft and the spare parts therefor are necessary to enable it to carry forward its jet training program so that it will be in a position to conduct certificated jet service as soon as sufficient jet equipment is delivered" (A200), the CAB approved the transaction by order dated February 26, 1959. (Order No. E-13542; A199). Thereafter as a means of temporarily financing the jet aircraft TWA was to acquire, Toolco and TWA entered into additional, temporary day-to-day lease arrangements. Toolco undertook the entire risk by providing in the agreements that no rentals would be payable pending receipt of the requisite approval by both CAB and the lending institutions (*e.g.*, R. 633-34).

Pursuant to CAB approval of motions by TWA, all fifteen of the 707-131s ordered by Toolco (together with necessary spares) were delivered for use by TWA between January and August of 1959 (see R. 616-34). On May 15, 1959 the Board entered an order (E-13873; A201) in response to a TWA motion of March 13, 1959 (R. 378) permitting TWA to lease up to eleven aircraft from Toolco as they became available and to acquire from Toolco up to $3.5 million worth of spare parts therefor;* however, the Board deferred action upon an additional request by TWA for permission to lease thirty spare jet engines from Toolco, stating that

* As the Board noted in its order: "TWA states that the aircraft and the spare parts and engines therefor are necessary to enable it to carry forward its jet training program and to commence jet service on its certificated routes. . . ." (A202)

"inasmuch as the terms of the spare engine leases have not been filed, the Board cannot at this time determine whether modification of Order No. 3210 is justified with regard to the spare engine lease transactions." (A203).* By the time it was necessary for TWA to move for approval of the balance of the Boeing 707-131 leases it had become apparent that the program to acquire permanent financing was not proceeding as anticipated. As described by the Board's order entered July 1, 1959 (No. E-14169) granting the requested relief, in its motion (R. 383-89):

> "TWA states that it had anticipated that definitive financing arrangements permitting it to operate these jet aircraft on a permanent basis would have been finalized by June 30, 1959, but that since arrangements for such financing have not as yet been completed the parties to the leases now desire to extend them until September 30, 1959 . . . ." (A205)

Pursuant to the condition imposed in the CAB orders (see A203, A206), TWA filed copies of the aircraft leases as each was executed. (R. 616-34).

By order dated July 22, 1959, pursuant to Section 409, the CAB approved the holding by Raymond M. Holliday of interlocking directorships and offices "within the system of affiliated and subsidiary com-

* In a subsequent filing TWA advised the Board that it was able to purchase, from the manufacturer sufficient spare engines to satisfy interim requirements, and that it decided to defer the question of how it should handle the acquisition of its total spare engine requirement pending accomplishment of a definitive financing program for its jet equipment. (R. 386-87).

panies composed of Toolco and TWA." (Order No. E-14251).

So long as Toolco was able to carry the entire burden of financing the TWA jet fleet, there did not appear to be any pressure upon TWA to obtain a permanent financing plan. Pursuant to a motion by TWA (R. 390-94), the CAB approved abrogation of the September 30, 1959 termination date for the day-to-day leases upon which TWA was able to operate its jet aircraft. (Order No. E-14504; A207). The Board found that such a modification of the control relationship "is just and reasonable and in the public interest," but provided that its order "may be amended or revoked at any time at the discretion of the Board without hearing." (A208).

On November 6, 1959, TWA moved for CAB approval of additional day-to-day leases of up to eight Boeing 707-331s and eight of the Convair 880s which were coming available. In its moving papers (R. 395-404), TWA stated, *inter alia*: that Toolco had on order twelve 331s and thirty 880s; that TWA had no commitment to acquire these aircraft but contemplated that certain of them would be made available for use in its operations; that the first deliveries of the Boeings and Convairs were anticipated during November and December 1959, respectively; and that Toolco was willing to make the aircraft available to TWA under leases substantially identical to the ones theretofore approved and would at TWA's request supply the necessary spare parts at cost. In its order (Order No. E-14877 (Jan. 29, 1960); A209), the

Board noted the further statement by TWA that "the aircraft and spare parts therefor are necessary to enable it to carry forward its jet training program and to provide additional jet service over its certificated routes pending completion of definitive financing arrangements permitting it to operate these aircraft on a permanent basis" (A209-10), and upon the finding that to do so "is just and reasonable and in the public interest" agreed to a modification of the basic control order so as to permit the proposed transactions (A210); once again, however, it was provided that "this order may be amended or revoked at any time in the discretion of the Board without hearing." (A211).

During 1959 it was also reported to the Board (i) that TWA's earnings generated sufficient funds as to permit repayment of the $12 million note held by Toolco by reason of its guarantee of TWA's December 1957 bank loan, and (ii) that one of the Lockheed 1049H aircraft which TWA had subleased was destroyed and that TWA, pursuant to the provisions of the Board-approved agreement, paid Toolco the agreed value. These TWA-Toolco transactions were reported in a year-end statement filed by TWA pursuant to the original orders approving Toolco's control. (See R. 637).

M. 1960

In March 1960, TWA and Toolco agreed to support a plan, submitted by Dillon Read, which contemplated that Equitable and one or more other insurance com-

panies would supply permanent senior long-term financing, Irving and associated banks would supply short-term and interim senior financing to TWA, Toolco would accept $100 million of subordinated debt or equity securities of TWA in payment, *pro tanto,* of TWA's obligations to Toolco and also establish a revolving credit in favor of TWA in the amount of $50 million. Other features presented by the plan included:

(a) Acceleration of the maturity of and increase in the interest rate on TWA's sinking fund bonds due in 1969 held by Equitable (see pp. 18b-19b, *supra*);

(b) A guarantee by Toolco of the payment of said bonds; and

(c) Execution of an agreement which would provide that in the event of certain defaults, including a default as a result of a change of management, the TWA stock owned by Toolco would be placed in a voting trust controlled by the lenders. (See R. 414-17, R. 459-72).

With the financing hurdle apparently surmounted, TWA and Toolco proceeded with transactions—subject to approval by CAB and the lending institutions—whereby TWA would acquire from Toolco (1) the fifteen Boeing 707-131s then under lease, (2) ten Boeing 707-331s, (3) twenty Convair 880s, (4) necessary spare parts and engines for these aircraft, (5) one flight simulator for training crews on the 880s, and whereby Toolco would agree, for the benefit of TWA, to provide (6) its guarantee that a proposed

offering of TWA equity securities would yield $100 million to TWA, (7) its guarantee of a $50 million interim bank loan, and (8) the additional loan of up to $50 million to enable TWA to complete the financing plan and maintain its net working capital above $10 million. The motions of TWA with respect to these transactions (see R. 405-25), received CAB approval on June 23, 1960. (Order No. E-15430; A211). In its order the Board took cognizance of the yet uncompleted financing (see A212) and made the following remarks:

> "Upon the basis of the application and the representations contained therein, the Board finds that 'the acquisition of the 45 aircraft and the proposed financing program, including the possible increased percentage of common stock held by Toolco in TWA, do not appear to violate the intent of the original restrictions imposed on transactions between TWA and Toolco.' Accordingly, further modification of Order 3210 is just and reasonable and is in the public interest. It appears, however, that the transactions may otherwise be subject to section 408 in that they may involve TWA's purchase of a substantial part of the properties of Toolco. However, upon the basis of the above circumstances, the Board finds that the enforcement of section 408 would be an undue burden on TWA by reason of unusual circumstances affecting its operations and would not be in the public interest. Therefore, for the reasons expressed above, the Board will exempt TWA from section 408 to the extent that

such section might prohibit the transactions without prior Board approval." (A213-14).

During May 1960 agreements were reached whereby. (1) Toolco agreed to release six of its excess Convair 880 positions so as to enable Northeast to lease such aircraft from Convair, (2) Toolco agreed to provide Northeast with up to $9.5 million in direct financial assistance, and (3) there was submitted a proposal involving the merger of Northeast and TWA.* On the petition of one of Northeast's competitors, the CAB instituted a formal investigation into these matters in July. See *Northeast Airlines, Cancellation and/or Suspension,* 31 C.A.B. 1003 (1960). This investigation was thereafter subsumed into the *Toolco-Northeast Control Case.*** (See discussion at pp. 37b-39b, *infra*). Toolco negotiated the merger proposal to remedy the serious seasonal imbalance in TWA's route structure. The proposed merger was approved by Northeast's Board of Directors on May 16, 1960 and was then submitted for consideratioin by TWA. At the request of TWA the expiration of the merger proposal was extended from time to time by Northeast. On March 22, 1961 TWA requested a further extension to June 30. This request was denied by North-

* The proposal, submitted to TWA after approval by the Northeast Board of Directors, specifically conditioned consummation upon the consent by (i) a majority of TWA stock other than that held by Toolco, (ii) CAB, (iii) the SEC, which under the Investment Company Act could only give such approval after finding that the merger terms were fair and equitable and that the merger did not involve overreaching on the part of any person concerned, and (iv) TWA's senior lenders. (f. 20441-74).

** The release of six Convair 880s is discussed more fully at pp. 3a-5a of Annex A, *supra.*

east, but it indicated a willingness to discuss the matter further at any time (R. 805). In fact the merger was never consummated.

By May 1960 the lending institutions, including Metropolitan which had agreed to supply the portion of the insurance company financing not being supplied by Equitable, committed themselves to the Dillon Read plan but upon the condition that they be permitted to withdraw their commitment in the event of a change in TWA's management deemed by them to be adverse. The maturity of TWA's sinking fund bonds held by Equitable was accelerated to the initial closing date for the permanent financing and such indebtedness was also guaranteed by Toolco. The initial closing date was ultimately postponed to the end of July and the entire program was submitted to the Board by Toolco's motions dated May 9 and July 1, 1960 for the appropriate approval (R. 412-90). The Board reviewed the components of the program which had been submitted to it, including the acquisition by TWA from Toolco of two additional Boeing 707-331s, and gave its approval to the Toolco-TWA transactions. (Order No. E-15561; A215; see Order No. E-15430, 31 C.A.B. 982; A211).

In its order dated June 23, 1960 the Board observed:

> "... It is true that, should the rights offered to TWA stockholders be in the form of common stock and Toolco purchased all the new stock pursuant to its guarantee, Toolco's interest in TWA would increase from the present 78 percent to approximately 90 percent. Although, normally,

> an increase of 12 percent in stock ownership would be considered substantial and would give rise to a new control relationship under section 408, in view of the overwhelming control of TWA by Toolco by virtue of Toolco's ownership of 78 percent of the stock, the Board concludes that any increase of control is insignificant and does not call for a reexamination of the relationship under section 408." (A213)

However, the program there presented was not consummated due to the resignation of TWA's president, Charles Thomas, on July 27, 1960.

By motion dated December 22, 1960, TWA sought appropriate C.A.B. action upon the rejuvenated program of jet acquisition and financing. Reference was made to its earlier motions and approval orders of the Board resulting therefrom in June and July, and that pursuant to such authorizations TWA had acquired eleven aircraft "through temporary debt financing of TWA, guaranteed by [Toolco], and the issuance of subordinated obligations by TWA to [Toolco] . . ." (R. 492-93). TWA then stated that the first closing on the definitive financing was to be on December 29, 1960, and that:

> ". . . The terms of this financing and of the transactions between TWA and Hughes relating thereto are to be substantially the same as those set forth in TWA's motions of May 6, 1960 and July 1, 1960, approved by orders of the Board dated June 23, 1960 and July 21, 1960. Among the changes, which it is believed do not affect the

substance of the transaction, are the deposit by Hughes at the time of the first closing under the definitive financing arrangements, of Hughes' TWA stock, in the voting trust (which was previously to be established only under certain conditions) and the granting to Hughes by the purchasers of TWA's secured obligations of options to acquire such obligations from the holders thereof under certain conditions." (R. 493-95).

Copies of the various documents relating to the long-term financing program were submitted with the motion (R. 494; see R. 497-570). TWA requested speedy disposition by the Board. (See R. 572-73). By order dated December 29, 1960 the Board, upon a detailed discussion of TWA's jet acquisition and financing program as well as related matters dehors information presented in the motions filed by TWA,* exercised jurisdiction and permitted further modification of the basic control orders and exempted TWA from the requirements of Section 408 insofar as the specified aircraft purchases were concerned. (Order No. E-16195, A218-27). Thereupon, the transactions were consummated. (B64, B85; *cf.* R. 638-39).

* "We are advised that it was the insistence of the financial institutions upon the establishment and terms of the voting trust and of the conditions for its dissolution which have been the major stumbling block in recent weeks to the consummation of TWA's initial jet financing program. We have not been told officially of the reasons which motivated the decision of the insurance companies and banks to seek this protection. However, we have not been unaware of TWA's problems." (A223; footnote omitted).

N. 1961 to date

During March 1961 Tillinghast was selected as TWA's president. Thereafter, TWA entered into agreements (i) with Boeing for additional jet aircraft costing about $187,500,000 and (ii) with Equitable, Metropolitan, Irving and associated banks for $147 million of additional financing. (See, *e.g.*, A17; B64-65, B81). The 1961 loan agreements, to which Toolco was not privy, contain provisions whereby the lending institutions could accelerate the additional debt upon, *inter alia,* a termination of the Voting Trust for any reason—including operation of law or action by any court or administrative agency.*

On June 30, 1961 TWA filed the present complaint against Toolco, Hughes and Holliday.

By order dated November 8, 1961 responding to a joint application by Northeast and Toolco requesting permission for emergency financial assistance by Toolco for Northeast, the CAB instituted the *Toolco-Northeast Control Case*—an expedited investigation into the control questions under Section 408 of the Act. Therein the Board took cognizance of the cur-

* Such provision was made notwithstanding that the agreements between TWA, Toolco and the lending institutions pertaining to the Voting Trust provided that it would terminate (a) prior to December 15, 1970 upon exercise of *Toolco's* option to acquire the TWA indebtedness and pay the penalty of up to 22% thereupon, or (b) on such date unless extended as provided therein. (A221-22; see R. 528-70).

rent TWA-Toolco relationship and noted specifically the following:

". . . Toolco has for many years been the controlling shareholder of TWA. Although Toolco has made a major financial contribution to TWA's development, the merit of its management of the carrier has been publicly challenged. Less than a year ago we had occasion to comment on some of the factors which were causes of concern in this regard. See Order E-16195, dated December 29, 1960. In that order, we allowed to go into effect a new TWA financing program, one condition of which was that Toolco would place its TWA stock in a voting trust for which Toolco has the right to designate but one of three voting trustees—an arrangement insisted upon by the carrier's lenders. We also stated therein that we would anticipate the obtaining of the approval of the Board before Toolco could resume control over TWA.

"Subsequent to this action, the new management of TWA filed a suit against Hughes, Toolco, and an associate of Hughes. The complaint alleges various acts on the part of the Toolco management in derogation of their managerial responsibilities, and anti-trust violations of the Sherman and Clayton Acts. Atlas is named as a co-conspirator. We must take notice of these allegations even though they have not been proven or established. It is reasonable to anticipate that efforts will be made to thoroughly explore them at the hearing." (Order No. E-17675 (R. 764); see also Order No. E-17811, 34 C.A.B. 583, 594-95 (1961) (dissent)).

Annex B

Although penetrating issues were formulated and detailed evidence was requested,* and after notice** a full public hearing pursuant to Section 408(b) was had, both the Hearing Examiner (see R. 792-832), who determined that there was no evidence to indicate that the exercise of control by Toolco over TWA was in a manner not authorized and approved by the Board under the Act,*** and the Board (R. 833-46) held that it was in the public interest to permit Toolco to acquire control of Northeast. (Order No. E-18470 (June 19, 1962), *aff'd sub nom. National Airlines* v. *CAB,* 321 F.2d 380 (D.C. Cir. 1963)).

In the fall of 1963 Toolco entered into a transaction whereby Toolco (1) would make a public offering of some $81 million principal amount of TWA subordinated income debentures it had acquired in 1961 as a result of the 1960 financing agreements and (2) would acquire from TWA $30 million of convertible subordinated debentures. On October 21, 1963 the CAB entered an order further modifying the order in the 1944 control case so as to permit consummation of the Toolco-TWA transaction; the Board denied a motion by TWA to dismiss Toolco's application for approval. (Order No. E-20105).

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* See Report of Prehearing Conference (R. 766-86), particularly Issue 2(f) (R. 773).

** See R. 786-92.

*** The Examiner found that "There is no evidence in this record, and none that would support a finding, that Toolco, in its dealing with either Northeast or in its prior control of TWA, engaged in improper self dealing with either of these two companies or that it engaged in unlawful activities." (R. 820).

In 1964 Toolco moved the Board for an order disclaiming jurisdiction over or approving Toolco's exercise of its option to acquire from Equitable and Metropolitan the $92,800,000 of TWA indebtedness and thereby accede to the position of being able to terminate the Voting Trust. TWA opposed the motion on the basis that that transaction would constitute an acquisition of control without prior Board approval pursuant to Section 408. On July 10, 1964 the Board entered an order which denied Toolco's motion on the ground that the possibility of simultaneous control by Toolco over Northeast and TWA had never been passed upon by the Board. However, in view of a suggestion by Toolco that it was willing to divest itself of the power to control Northeast, the Board proceeded with a declaration of Toolco's rights, stating:

> "As previously indicated, the Board in 1950 approved, under section 408, Toolco's ownership of 73 per cent of the stock of TWA. The question presented is whether or not this approval terminated as a result of the voting trust which prevented full exercise of the approved control. We conclude that our earlier approval did not so terminate and that resumption of full control by Toolco under its option to purchase the Notes would not result in an independent acquisition of control subject to the hearing and approval requirements of section 408.
>
> "In our view of the matter, we need not reach the issue as to whether the voting trust effected a complete insulation of Toolco's control over

TWA within the meaning of section 408. Even if we assumed that Toolco temporarily lost all power to control TWA during the period of the voting trust, this fact would not have effected a termination of the Board's prior approval of the Toolco control of TWA under the unique circumstances present here. In our judgment, there was involved at most a temporary hiatus in control imposed upon Toolco by the exigencies of TWA's financing requirements. Toolco at all times has retained the beneficial ownership of the stock in question. The trust itself is for a temporary period of ten years and is terminable prior to the end of that period upon the discharge of TWA's indebtedness to the financial institutions. We find nothing in either the literal language of section 408 or its underlying policy that would require that Toolco be subjected to a second hearing on the very issue which was previously heard and decided by the Board. A contrary reading of the statute would result in harassment of Toolco without vindicating any statutory objectives." (Order No. E-21057. pp. 4-5 (footnotes omitted)

Thereupon the Board "declared that Toolco may exercise its option to acquire the TWA Notes described herein at such time as it submits a plan satisfactory to the Board which would effectively divest Toolco of the power of simultaneously control both TWA and Northeast . . . ." (*id.*, p. 5).

Annex B

On petition by TWA for judicial review, the Court of Appeals for the Second Circuit set aside the Board's order, apparently holding that the last-quoted portion of the order was an abuse of discretion, and remanded the matter to the Board for action not inconsistent with the decision. See *Trans World Airlines* v. *CAB*, 339 F.2d 56 (1964). Toolco, which had intervened in the appeal, and the CAB both filed petitions for rehearing. Toolco's petition also contained a suggestion for rehearing *in banc*. On January 11, 1965, pursuant to order of the court, TWA responded to such petition. By order dated February 11, 1965 the Court of Appeals denied the CAB's petition. Toolco's petition was denied on February 18, 1965.